



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

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## Young Beneficiaries Information for Parents and Estate Trustees

Did you know that a child under the age of 18, referred to legally as a minor, is actually not allowed under the laws of Ontario to directly receive a substantial inheritance? This is true whether the inheritance is a cash gift or some other asset. You may also be surprised to learn that a parent does not automatically have the right to control their minor child's inheritance unless the inheritance is held in a trust.

A minor's inheritance may be governed by the terms of a trust. A trust may be included in a will or in a separate document. A person who manages a minor's inheritance under a trust is called a trustee. The estate trustee or executor (the person who administers the estate) and the trustee could be the same person or could be someone else such as the parent of the child. The appointment of a trustee is usually spelled out in the will or trust document. When we describe the duties and responsibilities of an executor below, similar duties and responsibilities apply to a trustee or a minor's guardian of property.

Although this brochure is primarily intended to address issues relating to a minor beneficiary, much of the information also applies to a mentally-incapable adult. Also see our brochure *Providing for a Family Member with a Disability*.

### Ways to Inherit

A minor may inherit as the result of someone's death in a number of ways:

- the minor is named as a beneficiary in a will;
- the minor inherits from a relative who died intestate (without a will) and the minor is one of the legal beneficiaries under the intestacy laws of Ontario;

- the minor receives the payment on the death of someone who had named the minor as a beneficiary of a life insurance policy, an RRSP, RRIF, TFSA, or death benefit.

### Gifts Under a Will

Inheritances left to a minor could be a cash gift of a specific amount or a gift of a portion of the residue of the estate. Residue is what's left of an estate after the estate's debts are paid.

### Cash Gifts

A will can include a cash gift of a specific amount for a minor. All cash gifts set out in a will are paid before the residue beneficiaries receive their gifts. For this reason, if a will includes one or more cash gifts, a threshold should also be included. A threshold specifies a minimum value that the estate must be worth after debts have been paid and before the cash gifts are paid. This ensures that there is at least a minimum amount left for the residue beneficiaries after the cash gifts are paid.

If a cash gift for a minor exceeds \$10,000, the Office of the Children's Lawyer (OCL) will become involved (more below). This creates more work for the estate trustee and makes it more difficult to pay the gift to the parent of the minor even if the will specifically allows for this.

### Gifts of Residue

A minor can also be named in a will to receive all or a share of the residue of an estate. It is impossible to predict what the value of a person's estate will be upon their death. So, it is also impossible to predict what the value of the minor's gift of some or all of the residue may be. An unexpected windfall such as an inheritance, payout

from a settlement, or a lottery winning may cause a person's estate to be worth far more than they thought when they signed their will. If leaving a gift of residue to a minor, it is prudent to ensure there is a trust to hold the gift until the minor is an adult.

A well-drafted trust and additional powers for the estate trustee will ensure he or she has the maximum flexibility to deal with the minor's gift regardless of the size of the inheritance. Careful drafting can allow the estate trustee to consider the circumstances of the minor at the relevant time and make payouts from the trust as appropriate rather than handing over large sums of money too early.

### **Who Controls the Inheritance**

Contrary to popular belief, the parent of a minor does not automatically have the right to control the minor's inheritance. If a minor inherits under a will, the will may appoint the parent as trustee of the child's inheritance. Otherwise, a parent can only control a minor's inheritance (or any other assets of the minor) by applying to the court to be appointed as the minor's guardian of property. Whether appointed by the will or by the court, the parent must manage the inheritance for the minor's benefit and according to the terms of the will or the court order.

### **Jackpot at 18**

Unless a will states otherwise, when a minor reaches the age of 18, as an adult he or she can demand that the estate trustee (with or without a will) or the guardian of property hand over the money. In some circumstances, he or she can also demand a full accounting of all transactions affecting the inheritance and can review the actions taken (or not taken) by the estate trustee, trustee, or guardian including any compensation taken.

### **Deferring Payments Beyond 18**

To defer the payment of an inheritance until the minor is older than 18, the will or trust document must include specific conditions. A trust can specify that partial payments of the inheritance be made at various ages with income (what the trust assets earn) being paid out regularly. For example, a trust might instruct that a quarter of the inheritance is to be given to the beneficiary at age 18 and the balance at age 25 with payments of income being made to the beneficiary between the ages of 18 and 25.

## **Obligations of an Estate Trustee or a Trustee**

An estate trustee (with or without a will) has an on-going responsibility to manage and invest a minor's inheritance until it is handed over to the beneficiary or paid into court on behalf of the minor beneficiary (more on this below). Investments must be made in accordance with the provisions of the *Trustee Act* of Ontario and any other relevant legislation. If there is a will, conditions in the will must also be addressed.

An estate trustee is required to keep detailed accounting records and to exercise discretion as to when and what payments are made, considering the age and circumstances of the minor for whom the funds are being held.

An estate trustee or trustee should not hand over a minor's inheritance to the parent of the minor unless the parent has first been appointed as the minor's guardian of property and the court has released the estate trustee from further responsibility for the inheritance. Gifts under \$10,000 may be paid over to the parent of the minor so long as the funds are used for a specific purpose. However on reaching the age of majority, the minor can question the estate trustee's actions.

Alternatively, an estate trustee or trustee has the option of paying a minor's inheritance into court. This effectively discharges the estate trustee's or trustee's responsibility for the sum paid into court. He or she will not need to monitor the court's handling of the money, how it is invested, or keep any further records. It is not necessary for the minor to be a resident of Canada.

### **If Funds are Handed to Parent**

Unless the will provides otherwise, an estate trustee or trustee who hands over a minor's trust funds to the parent of the minor may continue to be liable. In general, unless the will or the court authorizes, the trustee should not deliver funds over \$10,000 to the parent or guardian of the child without the approval of The Office of the Children's Lawyer. Any funds delivered to the parent must be for a specific purpose allowed by the trust terms.

### **Role of the Office of the Children's Lawyer**

When a minor inherits, the Office of the Children's Lawyer (OCL) may become involved. The OCL is an office within the Ontario Ministry of the Attorney General. The OCL's mandate is to represent the personal and property rights of

minors and unborn children. Property rights include estate and trust matters such as challenges to the validity of a will, applications to remove trustees, and applications to vary the terms of a trust.

The OCL does not have the authority to administer estates nor does the OCL act as guardian of property for a minor. The OCL cannot give a formal release of liability to an estate trustee or trustee. Only a court can provide a release for the actions of an estate trustee or trustee (including the taking of compensation) that is binding on behalf of a minor. This process is called a passing of accounts. Please see our brochure titled *Passing of Accounts*.

### **Child with a Disability**

If a child with a disability who is under 18 might qualify for the Disability Tax Credit (DTC), here are two important reasons to apply for it sooner than later. If granted:

- the child with a disability can be the beneficiary of a Registered Disability Savings Plan (RDSP) and certain government contributions to the RDSP whether or not other contributions are made,
- a Henson trust established for the child will enjoy more favorable tax treatment as graduated tax rates can apply to trusts where the beneficiary qualifies for the DTC (but the trust must not have any beneficiaries who do not qualify for the DTC).

Parents should consider opening an RDSP for a child with a disability prior to the child's 18<sup>th</sup> birthday. Until December 31, 2016, if a person qualifies for the DTC but is over 18 and lacks mental capacity, the person's parent is permitted to open an RDSP.

Unless the rules change, that window of opportunity, once closed, will result in adults with a disability who lack mental capacity being unable to open an RDSP unless there is a guardian of property appointed for him or her.

For parents of a child who has an RDSP, the parent's will and power of attorney for property should include specific authority allowing the estate trustee or attorney to contribute to the child's RDSP from the parent's assets or from a trust in a parent's will. Without this authorization, contributions from the parent's assets will not be possible resulting in lost tax planning opportunities.

For further information on providing for a child with a disability, please see our other brochures including *Providing for a Family Member with a Disability*, *Gifts to ODSP Recipients*, *How Can Trusts Help Me and My Family* and *Henson Trusts - Acting as a Trustee*.

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