

WILL & ESTATE PLANNING

Legacy Planning for a
Relative with a Disability

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ESTATE PLANNING: KEY ELEMENTS

What do I need from my Lawyer?

- Will
- Trust (Henson Trust, Inheritance, etc.)
- Continuing Power of Attorney for Property
- Power of Attorney for Personal Care

ESTATE PLANNING: KEY ELEMENTS

Plan with the following in mind:

- Social assistance benefits (ODSP)
- Registered Disability Savings Plan (RDSP)
- Other registered plans (RRSP/RRIF, RESP, TFSA)
- Tax planning & the Disability Tax Credit
- Charitable giving
- Life insurance/ segregated funds
- Guardianship for minors
- Home Ownership Options

A. MANAGEMENT OF PROPERTY

- Consideration: **Does the person with a disability require support to manage their property?**
- Presumption of Capacity
- Capacity requirements:
 - Ability to understand the information relevant to making a decision
 - Ability to appreciate the reasonably foreseeable consequences of a decision or lack thereof

B. INTERACTION WITH OTHER COMPONENTS

Consideration: **What are the other components of your estate plan?**

- Registered Disability Savings Plan (RDSP)
- Disability Tax Credit (DTC)
- Registered Retirement Savings Plan (RRSP)
- Tax-Free Savings Account
- Registered Education Savings Plan (RESP)
- Life Insurance
- Pension

C. SOCIAL ASSISTANCE

- Consideration: **Does the person with a disability receive social assistance, such as Ontario Disability Support Program (ODSP) benefits?**
 - If so, protection of the person's ODSP should be included in the estate plan i.e. using a Henson Trust

ODSP - INCOME SUPPORT

What is ODSP?

- Provincial income support program
- Provides income and employment support to people with disabilities 18 to 65 years of age
- Amount of income depends on family size, income, assets and housing costs
- Monetary allowance and other benefits (health, disability-related, employment incentives, housing-related)

ODSP – FINANCIAL ELIGIBILITY

INCOME

- Budgetary requirements must exceed income
- **Non-exempt income:** CPP, WSIB, pension payments
- **Exempt Income:**
 - Gifts and voluntary payments is \$10,000 per 12-month period (includes income from trusts)
 - No limit on income for disability-related needs or from the RDSP
 - Portion of employment income

ASSETS

- Non-exempt assets
 - Maximum allowable amount is \$40,000 (single recipient)
- Exempt assets
 - Include a principal residence, vehicle, RDSP, RESP, Henson Trust, government-regulated trust, segregated fund up to \$100,000
- Leaving assets to ODSP recipient in a will can negatively impact benefits and disrupt plan for care

THE IMPORTANCE OF HAVING A WILL

- Allows you to appoint:
 - Beneficiaries of your estate
 - People to take care of your affairs (Estate Trustees)
 - Trustees of testamentary trusts
 - Guardian(s) for minor children
- Permits tax planning strategies to maximize value of asset
- Reduces cost of administering estate
- **Allows you to leave an inheritance without affecting eligibility for social assistance i.e. ODSP benefits**

WHAT IS A TRUST?



SETTLOR

Person setting up the trust



TRUSTEE(S)

Person(s) responsible for managing the trust



BENEFICIARIES

Person who will receive the funds

COMMON TYPES OF TRUSTS

- **ODSP Related Trusts**
 - Inheritance/ODSP/Shelter Trust
 - Henson Trust
- **Tax Planning**
 - Qualified Disability Trust
 - Lifetime Benefit Trust

ODSP RELATED TRUSTS

INHERITANCE TRUST

- Can be a non-discretionary trust
- Proceeds from estate or life insurance policy of less than \$100,000
- May be set up by beneficiary after person's death
- Funds must be kept in a separate bank account
- Cannot be controlled solely by beneficiary
- Trust agreement is a good idea

HENSON TRUST

- Absolute discretionary trust
- Not considered an asset by ODSP
- No monetary limit applies
- Residual beneficiary(ies) named
- Inter-vivos (living) or testamentary (in a will) trust
- Consider naming multiple trustees

QUALIFIED DISABILITY TRUST

- Allows income to be taxed at graduated rates
- In order to qualify:
 - Trust be resident of Canada
 - At least one beneficiary must qualify for the DTC
 - Trust capital cannot be paid to non-qualifying beneficiary
- Beneficiary can only benefit from one QDT

LIFETIME BENEFIT TRUST

- Allows for RRSP/RRIF rollover to trust on tax-deferred basis
- In order to qualify:
 - Beneficiary must be child, grandchild, spouse of common-law partner
 - Child/grandchild must be dependent on deceased at time of death due to mental disability
 - LBT named as annuitant of “qualified trust annuity”

TRUSTEE CONSIDERATIONS

- Honest and trustworthy
- Highly involved in beneficiary's life
- Sensitive to beneficiary's needs and wants
- Understands ODSP rules
- Age
- Investments and income tax
- Record-keeping
- Be aware of potential conflicts of interest!

LEGAL DECISION-MAKING

Continuing Power of Attorney for Property

- Gives someone the authority to act on your behalf while you are alive
- Specifically with matters relating to property (real property, finances, etc.)
- May take effect when grantor is capable
- Continues when grantor is incapable

LEGAL DECISION-MAKING

Continuing Power of Attorney for Property (cont.)

- Can name more than one attorney
- “Jointly” or “jointly and severally”
- Attorney(s) must be over age 18
- Can do almost anything except execute a will, appoint a new Power of Attorney or change beneficiaries
- Entitled to compensation

LEGAL DECISION-MAKING

Power of Attorney for Personal Care

- Gives someone the authority to act on your behalf while you are alive
- Specifically with matters relating to health care, medical treatment, shelter, nutrition, hygiene & safety
- Authorizes attorney(s) to act only when you are incapable
- Can name more than one attorney
- Attorney must be over 16 years of age