ANSWERS TO YOUR QUESTIONS ABOUT INHERITANCES AND THE ONTARIO DISABILITY SUPPORT PROGRAM (ODSP)

THE INDEPENDENT LIVING CENTRE OF LONDON & AREA

MAY, 2007

[NOTE: This pamphlet can provide only general answers to you questions, and does not discuss all details of the ODSP program. If you have a specific issue with respect to the laws governing ODSP and inheritances, you should consult a lawyer or legal clinic.]

A. ISSUES WHEN YOU ARE AN ODSP RECIPIENT AND RECEIVE AN INHERITANCE

1. Can receiving an inheritance affect my eligibility for ODSP? Is there anything my family and I can do about this?

Yes, receiving an inheritance can make you either partly or totally ineligible for ODSP This is because ODSP is a "needs-tested" program. Eligibility for ODSP depends on your assets and income being within the levels permitted by the ODSP rules. When you receive an inheritance, just as when you receive money or property from any source, you are required to report this to ODSP, and there is a risk that your cheque may be reduced, or that you may become ineligible.

However, the good news is that there are a number of ODSP rules that do allow you to receive an inheritance, and to make use of it to improve your life, provided that you and your family go about it in the right way, taking the ODSP rules into account. The purpose of this pamphlet is to introduce you to the most important considerations which you and your family should take into account.

2. What is meant by "assets" within ODSP? How much am I allowed to have in assets?

Within the ODSP program, "assets" includes financial property, such as money in the bank, Registered Retirement Savings Plans (RRSP's), Canada Savings

Bonds, stocks, mutual funds, and other types of investments. It also generally includes real estate except for the home in which you live (your "principal residence"). Generally speaking, personal items such as furniture and clothing are not included in your assets, except for valuable collectibles such as coins, stamps, and antiques.

The general asset limit within ODSP is $5,000 for a single person and $7,500 for a couple. If there are dependent children (who in some circumstances can be over 18), an additional $500 is added to the asset limit for each child.

3. What are exempt as "assets" within the ODSP program?

There are a number of important items within the ODSP rules which are "exempt" from being considered assets. The most important of these for our purposes are:

- Your "principal residence" (that is, the home in which you live)
- A "second property" (such as a cottage), if ODSP officials determine that it is necessary for the health or well-being of you, your spouse, or your children
- A motor vehicle of any value (this would permit an ODSP recipient to own a van modified for wheelchair accessibility, for example)
- A second motor vehicle with maximum value of $15,000, if the spouse of the ODSP recipient requires the second vehicle to work outside the home
- If you start your own business, the "tools of the trade" (such as a computer, a sewing machine, or electrician's tools) are exempt as assets, and if your business requires you to have raw materials, supplies or inventory on hand, an additional $20,000 "business asset" exemption applies to them
- A prepaid funeral of any value (so long as the funds are not accessed for another purpose prior to death)
- A life insurance policy on your life, or on the life of your spouse or dependent children, so long as the "cash surrender value" of the policy, together with the value of any "inheritance trusts" of which you, your spouse, or your dependent children are the beneficiaries, does not exceed $100,000 (the "cash surrender value" of a life insurance policy is the amount the insurance company would give you to "cash in" the policy right now before you die – the "cash surrender value" of a policy is usually much less than its "face value", which is the amount that is paid out in the event of the death of the insured person)
- Registered Education Savings Plans (RESP's) held by you for the benefit of your children (or for the benefit of other children or young persons related to you) are exempt, so long as they are held or used for educational purposes

- "Locked-in" Registered Retirement Savings Plans (RRSP's) – note that RRSP's are generally **not** exempt unless they are "locked-in", which usually occurs when they are created by transferring funds from an employer's pension plan

- A trust fund for your benefit, or for the benefit of your spouse or children, which is derived from an inheritance, if the trust fund is a "Henson Trust" of any amount

- A trust fund for your benefit, or for the benefit of your spouse or children, if the trust fund is not a "Henson Trust" but is derived from an inheritance or life insurance proceeds, and has a value of less than $100,000, taken together with any other trust funds you, your spouse or your dependent children have and the cash surrender value of any life insurance policy you, your spouse, or your dependent children own

The last two exemptions, dealing with trust funds and inheritances, are of great importance to ODSP recipients who are receiving an inheritance, or will do so in future. We will discuss them in more detail later in this pamphlet.

There are a number of other ODSP asset exemptions which are beyond the scope of what we discuss in this pamphlet.

4. What is meant by "income" within ODSP? How much am I allowed to have in income?

"Income", for ODSP purposes, is defined broadly as payments received by you, or your spouse or dependent children, from any source. It includes earnings from employment or self-employment, even casual earnings. It includes disability payments from another governmental plan, such as the Canada Pension Plan or the Workplace Safety and Insurance Board, or from a private disability insurer. It includes gifts from family and friends, and payments from a Henson Trust or other inheritance trust. If you have tenants or boarders in your home, it includes rent or board payments.

You have to report all of the income which you receive to ODSP on a monthly basis. If income received by you, your spouse or dependent children is not exempt for ODSP purposes, it will be deducted from your ODSP cheque.

As with assets, however, some types of income are totally or partially exempt within the ODSP rules, and do not reduce the ODSP cheque.

5. What payments are exempt as "income" under the ODSP program? What payments are not exempt? What payments are partially exempt?

Whether payments are exempt, non-exempt, or partially exempt as "income" under the ODSP rules depends largely on their "source" (that is, where they come from). The following are some examples of payments which are exempt, non-exempt, and partially exempt:

Exempt as income:

- An amount in gifts or voluntary payments from family members, friends, or the trustees of a Henson Trust or inheritance trust of up to $5,000 in any consecutive 12 month period for each of you, your spouse and your dependent children (note that the $5,000 limit in this rule is different from the $5,000 asset rule for a single person, which refers to the amount the ODSP recipient can have at any particular time, and also note that the $5,000 limit in the voluntary gifts and payments rule applies to any consecutive 12-month period, not just to a calendar year e.g. a $3,000 payment in November of one year and another $3,000 payment in March of the following year would violate the rule and create an ODSP payment reduction)

- Additional gifts or voluntary payments above the $5,000 12-month limit to or on behalf of an ODSP recipient, spouse or dependent child if these payments are for a disability-related item or service (such as personal support services, health-related costs, or the costs of disability-related accommodation)

- "Casual gifts of insignificant value", such as presents of clothing, meals, or occasional food purchases

- Earnings from employment of dependent children

- Loans for an approved purpose, such as the purchase of disability-related items and services, business loans, or Ontario Student Assistance Program (OSAP) loans for post-secondary education

Not exempt as income:

- Canada Pension Plan payments

- Employment Insurance benefits

- Child support payments

- Loans which are not for an approved purpose

Partially exempt as income:

- 50% of earnings from the "net pay" (the pay actually received after mandatory deductions) of ODSP recipients and spouses (this exemption can be increased by child care expenses or disability-related work expenses)

- 40% of gross rental income (the total rent received from your tenant or tenants)

- 60% of gross board and lodging income (the total board received from your boarder or boarders).

There are a number of other types of exempt, non-exempt, and partially exempt income which are beyond the scope of what we discuss in this pamphlet.

6. Why are the ODSP rules relating to assets and income important if I receive an inheritance?

The ODSP rules relating to assets and income are crucially important if you receive an inheritance, because if the inheritance is provided to you in the form of non-exempt assets or income it may limit your ODSP eligibility or even make you ineligible altogether. The goal of you and your family should be to ensure that money and other property are provided to you as exempt assets and income, so far as is possible.

B. THE IMPORTANCE OF THE "HENSON TRUST"

1. What is a "Henson Trust" and why is it important in planning a will where an ODSP recipient is a beneficiary?

A "Henson Trust" is also called an "absolute discretionary trust" by lawyers. In the 1980's, the father of a Family Benefits (FB) disability recipient named Audrey Henson established an absolute discretionary trust for her in his will. (Family Benefits disability was the provincial disability benefits program which was replaced by ODSP in 1998.) When he died, the provincial Family Benefits administration said that the trust was an asset and that she was no longer eligible for benefits.

The denial of benefits was appealed successfully to the Social Assistance Review Board (later replaced by the Social Benefits Tribunal) on behalf of Ms. Henson. The Ministry of Community and Social Services then made further appeals to the Divisional Court and the Ontario Court of Appeal, but both courts upheld the Social Assistance Review Board finding. The Ministry then decided not to seek leave to make a further appeal to the Supreme Court of Canada. Since that time, the Ministry has recognized the Henson precedent as authoritative for FB and later ODSP purposes, but has not enacted legislation to specifically provide for this.

Simply put, the legal theory behind the "absolute discretionary trust" is that, because there is no limit on the discretion of the trustee or trustees, the beneficiary has no entitlement to the funds or property in the trust until the trustee or trustees decide to make payments or allow the beneficiary to use the property. So the funds or property in the trust are not the assets of the beneficiary until the trustees "exercise their discretion", and the funds or property in the trust are not assets for ODSP purposes, regardless of the amount in the trust.

Accordingly, a Henson Trust can be used to leave any amount of money or property to an ODSP recipient without jeopardizing ODSP entitlement.

2. Does this mean that I can receive any funds or property the trustee or trustees choose to give me from a Henson Trust without jeopardizing my ODSP entitlement?

No. Once the trustee or trustees "exercise their discretion" to make payments or give property to you, the funds or other property become yours and are subject to the ODSP asset and income rules.

Payments from the Henson Trust to you are subject to the asset rules discussed in Section A. So your trustee or trustees cannot make payments to you which will result in your having more than $5,000 as a single person, or $7,500 as part of a couple.

The payments from the Henson Trust are also subject to the income rules. So you can receive only up to $5,000 from the trust during any consecutive 12-month period, unless the additional funds are for disability-related items or services, or for other exempt items, such as a motor vehicle.

Basically, your trustee or trustees are subject to the same rules in making a payment or gift to you using the trust as a living relative would be using her or his own funds.

3. Does this mean that a Henson Trust is the best main part of an estate plan for all ODSP recipients?

Not necessarily. For example, if there is a very large estate, the best plan may be to make a "full provision" for the ODSP recipient, and allow the individual to leave the ODSP program. Whether this is a better plan depends on a number of factors. First, besides the size of the estate, the testator or testatrix (person writing the will) has to consider whether there are other persons besides the ODSP recipient whom he or she should provide for. Second, the age of the ODSP recipient is relevant. Like other citizens, ODSP recipients receive Old Age Security benefits at age 65, and Old Age Security benefits are not "asset-tested" (you are not disqualified from Old Age Security because you have assets). Third, the potential of the ODSP recipient to receive other income (for example, from

earnings or from the Canada Pension Plan) should be taken into account. Fourth, if the ODSP recipient "goes off" ODSP, not only the income benefits, but also the extended health benefits (primarily the drug and dental cards) will be lost, and this must be factored in as well.

Conversely, if the estate is very small, and much less than $100,000 is available to provide for the ODSP recipient, it is much less important that the trust conform to the Henson precedent. Even here, however, it is important to keep in mind that the $100,000 limit takes other trusts and the cash settlement value of life insurance policies into account, so if there is a possibility of either of these occurring it is safer to use the Henson Trust approach.

Taking all these considerations into account, the Henson Trust is the recommended approach in most cases in which a will is being planned to benefit an ODSP recipient.

4. Are Ontario lawyers generally familiar with the Henson Trust?

Over the past two decades, there have been a number of legal articles and presentations at legal seminars dealing with the Henson Trust. It's probably safe to say that a much greater proportion of Ontario lawyers drafting wills are familiar with the Henson precedent now than 10 or 15 years ago.

But there are certainly some lawyers drafting wills in Ontario who are not familiar with the Henson Trust. It's best to ensure that the lawyer drafting your family member's will is familiar, not only with the Henson precedent, but also with the legal theory behind it. The Henson Trust depends upon a Court decision, not upon legislation, and if the precedent is changed by the lawyer so as to remove the absolute discretion of the trustee or trustees, the Ministry of Community and Social Services may well argue that the trust is not a "Henson Trust" at all. It is risky for a lawyer to change the wording of the trust considered in the Henson case unnecessarily.

5. What is the most important decision to be made in planning a Henson Trust?

There are a number of important decisions to be made by family members or friends in planning a Henson Trust. These include the funds and property to be placed in the trust, income tax implications, and what will happen to these funds and property after the ODSP recipient dies.

But the most important decision is the choice of the trustee or trustees. Recall that the Henson Trust is an "absolute discretionary trust", and the ODSP recipient has little, if any, control, over the decisions of the trustee or trustees. Even the Court has very limited control over their decisions. The trustee or trustees are not permitted to appropriate the trust funds or property for themselves, of course,

but provided that they have a reasonable basis for their decisions, the Court will not interfere with their "absolute discretion". So it is essential that the trustee or trustees be carefully chosen, to ensure that they will act in the best interests of the ODSP recipient.

The trustee or trustees require two kinds of expertise – financial expertise and personal expertise. Financial expertise is required to ensure that the trust funds and property are properly invested and managed. It is also required to ensure that the ODSP rules are complied with, and that the required annual reports are made to ODSP. The personal expertise that is required involves the relationship with the ODSP recipient who is the beneficiary of the trust. The trustee or trustees must be able to make informed decisions which will respect the wishes and meet the needs of the beneficiary, while also ensuring that the funds and property in the trust are available lifelong for the beneficiary, and are not spent unwisely. Because these two kinds of expertise are needed, it is often advisable to have more than one trustee, as one trustee may be stronger in the financial area than another, while the other has a stronger personal relationship with the beneficiary.

Another important reason for having more than one trustee is to avoid decisions being influenced by conflicts of interest. A common arrangement which has the potential for conflict of interest is where the trustee of a Henson Trust is a sibling of the beneficiary, and is also a "residual beneficiary" of the trust (that is, a person who will receive some or all of the trust funds or property on the death of the ODSP recipient who is the "primary beneficiary"). The potential conflict occurs because the trustee can try to keep the funds in the trust rather than spending them for the benefit of the ODSP recipient. This is not to say that all siblings would do this, but it is something that each family has to consider. In many cases, it makes sense to have more than one trustee, so there is some oversight of the decisions that are being made regarding the Henson Trust.

Yet another important reason for having more than one trustee is continuity. The Henson Trust will often continue during the entire lifetime of the ODSP recipient, which may span several decades. If only one trustee is appointed, that person may well be unavailable to act throughout the beneficiary's lifetime, because of death, poor health, or because the trustee has moved far away. So more than one trustee should be appointed, with at least one being a person of roughly the same age as the ODSP recipient who is the beneficiary, if at all possible.

It is also advisable to ask the lawyer to write the Will so as to give the trustees the power to appoint another trustee to act with them. If this is not done, and there are no trustees remaining at a future time, it will be necessary to apply to the Court to have a new trustee or trustees appointed.

6. Are trustees paid for their time, effort and expenses in administering a Henson Trust?

Trustees are generally entitled to compensation for their time, effort and expenses. This is commonly provided for in the Will creating the Henson Trust. In some cases, it is fixed by the Court. Family members or close friends acting as trustees may choose not to claim compensation, particularly if the needs of the beneficiary are significant and the trust is relatively small.

7. If family members do not have relatives or friends suitable to act as trustees, can they appoint a lawyer, an accountant, a Trust Company or the Office of the Public Guardian and Trustee? Is it advisable to do this?

Professionals such as lawyers and accountants can act as trustees of Henson Trusts. They have a relatively high degree of accountability because they are part of professions which are subject to strict rules of conduct. However, the services of lawyers and accountants tend to be quite expensive, and unaffordable except for very large trusts. There should be a careful discussion with the lawyer or accountant about these issues before he or she is appointed a trustee of a Henson Trust.

Trust companies have the advantage of experience in managing trusts. However, they vary greatly in their ability to provide effective services to trust beneficiaries with disabilities. Their fees also tend to be relatively high. Often, trust companies are not interested in administering "smaller" trusts (such as trusts of less than $100,000). Again, these issues should be discussed with the trust company before it is appointed as trustee of a Henson Trust.

The Office of the Public Guardian and Trustee will act as a trustee of a Henson Trust, but the Office views itself as a "last resort". It requires a written application which it approves prior to its being appointed as trustee. The Office is extremely busy and is located only in six cities throughout Ontario, including London. Because of its workload, the Office is reluctant to accept trusteeship where there is an alternative friend or family member available to act.

8. Will being the beneficiary of a Henson Trust affect my entitlement to social housing? Will it affect my entitlement to Legal Aid?

Social housing, also known as "rent-geared-to-income" housing, is a needs-tested program, just as ODSP is needs-tested. The regulations under the *Social Housing Reform Act*, however, do not contain the exemptions for trusts that are in the ODSP regulation. No Court precedent similar to the Henson case has been established for social housing. So whether or not your Henson Trust would affect your social housing rent or entitlement depends, at present, primarily on the discretion of the municipal administrators of the program.

Legal Aid Ontario generally accepts ODSP recipients as financially eligible for its services, so it is unlikely that a Henson Trust would affect your Legal Aid entitlement.

C. RECEIVING AN INHERITANCE OR LIFE INSURANCE PROCEEDS WHERE THERE IS NO TRUST

1. What happens if I receive an inheritance or life insurance proceeds from a deceased family member, and no trust has been created for them in the will? Does this mean I will lose my ODSP?

Not necessarily. You can still create a trust into which the inheritance or life insurance proceeds are placed, and this will be an exempt asset for ODSP purposes. It is subject to the $100,000 limit we discussed in Section A of this paper. That is, the trust must have a value of less than $100,000, taken together with any other trust funds you, your spouse or your dependent children have and the cash surrender value of any life insurance policy you, your spouse, or your dependent children own.

2. What can I do if I receive more than $100,000 in an inheritance or life insurance proceeds, either at once or together with other inheritance trusts and life insurance policies which have a cash surrender value? Can I create a Henson Trust, for example?

If the Henson Trust has not been created in the will of the deceased person, the ODSP recipient cannot create a Henson Trust after the person's death. The legal theory underlying the Henson precedent does not work in this situation. Once you are entitled to the funds or property outright, they become your assets, and under the ODSP rules you cannot dispose of assets to make yourself eligible.

What you can do in this situation is to use the inheritance or life insurance proceeds to purchase an exempt asset. The most frequent purchase of this type is a house or condominium, which is exempt as a "principal residence". Other possible purchases of exempt assets include a motor vehicle (such as an adapted van for wheelchair use), equipment and supplies to set up your own business, and a pre-paid funeral. You can also buy needed furniture, clothing, and disability-related items and services.

ODSP generally does not object to these expenditures so long as they are *bona fide* and reasonable. You cannot, however, deliberately pay too much for a house or a motor vehicle to make yourself eligible, as this would be an improper disposition of assets.

3. In order to create a trust for ODSP purposes, do I have to get a lawyer to prepare a formal trust document, or is there a simpler way to do it?

ODSP will generally accept that an inheritance or life insurance proceeds have been put "in trust" if they are placed in a joint bank account, for example, which requires the signatures of the "trustee" as well as the ODSP recipient in order to access the funds. The most suitable type of account for this purpose can be discussed with your financial institution (bank or trust company).

However, a formal trust document is recommended, to clarify the responsibilities of the trustee and the rights of the ODSP recipient who is the beneficiary.

4. I'm fully capable of making my own financial decisions. Do I still have to put my inheritance or life insurance proceeds into a trust for ODSP purposes?

Unless the amount of the inheritance or life insurance proceeds is small enough to fit within the general ODSP asset limit ($5,000 for a single person and $7,500) for a couple, you must create a trust to create an exempt asset under the ODSP rules.

You should try to find a trusted family member or friend to serve as your trustee – someone who will respect your wishes.

If you have a lawyer create a formal trust document, you can ask as the settlor (creator) of the trust that it be "revocable". This means that you retain the legal right to end the trust and reclaim your funds or property. You can exercise this right if you believe your trustee is not making appropriate decisions in your interest. Then you can create a new trust with another trustee, to meet the ODSP requirements. ODSP has thus far not challenged the legitimacy of trusts which are revocable, but will review the situation if the trust is actually revoked.

5. If an ODSP recipient is considered incapable of making financial decisions, can a trust be created for inheritances or life insurance proceeds received by her or him?

If the ODSP recipient is considered to have diminished financial capacity, but is still capable of understanding and executing (signing) a Power of Attorney for Property, the ODSP recipient can appoint someone using the Power of Attorney to create the trust for him or her.

If the ODSP recipient has a guardian of property appointed by the Court under the *Substitute Decisions Act*, the guardian of property can create the trust on behalf of the ODSP recipient.

If the ODSP recipient is financially incapable but has no guardian of property, ODSP will generally accept a "trust" created by opening an account with a financial institution over which the "trustee" has signing authority. However, there may be difficulties in opening such an account. The financial institution should be consulted in this situation.

D. ADDITIONAL RESOURCES

For more information about ODSP, including the ODSP Policy Directives, you can look at the Ministry of Community and Social Services web site at:

http://www.mcss.gov.on.ca/mcss/english/pillars/social/

Community legal clinics are a good source of information about ODSP issues. The community legal clinic in London and Middlesex is:

Neighbourhood Legal Services Inc.
(London and Middlesex)
Market Tower
151 Dundas Street
Suite 507
London N6A 5R7
Telephone: (519) 438-2890
Fax: (519) 438-3145

There is also a Student Legal Aid Society based at the University of Western Ontario:

University of Western Ontario
Community Legal Services
Clinical Legal Education Program
Room 120, Faculty of Law
The University of Western Ontario
London ON N6A 3K7
Telephone: (519) 661-3352
Fax (519) 661-3428
cls.law.uwo.ca