

## **Independent Living Skills workshop: Henson Trust**

Thursday, October 22<sup>nd</sup>

Guest Speaker:

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The purpose of a Henson Trust is to preserve ODSP benefits for a person who may get an inheritance over the allowable amount according to the ODSP assets assessment.

ODSP conducts income and assets tests to determine your eligibility for their financial support and benefits programs.

On ODSP, a single person with no dependents is allowed to have up to \$5000 in non-exempt assets at any time. For a person with a spouse, the limit is \$7500, plus an additional \$500 for each dependent child.

Certain assets are exempt from these tests and do not affect your ODSP entitlements (eg. owning your home, your primary vehicle, some trust funds from insurance or inheritance up to \$100 000)

A person on ODSP is also not allowed to receive more than \$6000 every 12 months from a trust, segregated fund account or as gifts from others, to pay for non-disability related expenses.

What is a Trust?

A trust is a financial arrangement in which one person looks after and is responsible for the assets of a trust for the benefit of another person.

Settlor – the person who sets up the trust account (may or may not be a different person than the beneficiary)

Trustee – the person responsible for managing the trust account

Beneficiary – the person the trust is designed to support, who receives the money from the trust

\*The Trustee and the Beneficiary can be the same person, but not in all cases (eg. Henson Trust – the **cannot** be the same person)

The legal title for the trust account is held in the name of the Trustee, but they are obligated to manage how the trust is used for the Beneficiary. This is a very important duty and needs to be taken very seriously. The Trustee must always act in the best interest of the Beneficiary.

Different Types of Trusts:

Inter-vivos Trust: set up during the life of the Settlor

These types of trusts are not exempt from the ODSP assets assessment

Testamentary Trust: set up for a beneficiary through a will

A Henson Trust has to be testamentary

Shelter/Rescue Trust: money inherited from a will and paid directly to Beneficiary

Must be in a trust account to be exempt from ODSP assets assessment, limit \$100 000

Henson Trust: fully discretionary trust

Is exempt from ODSP assets assessment, can be over \$100 000

\*fully discretionary = Trustee has full control over the assets in the account, Beneficiary has no control over when or how the money is spent.

\*\*THIS is why it is SO important that the Trustee be trustworthy and responsible.

Anyone on ODSP can have a trust, but the trust is only exempt from the assets assessment in certain cases.

Money inherited from a will, or received from a life insurance policy can be placed in a trust and will be exempt if it is below \$100 000

Money in a Henson Trust is always exempt

Testamentary Trusts and Shelter/Rescue Trusts are treated differently by the ODSP regulations.

A will leaving inheritance in a Testamentary Trust where the amount is less than \$100 00 will be exempt from the ODSP assets assessment. The Beneficiary can withdraw up to \$6000 in 12 months to purchase disability-related assets with the approval of ODSP. Additional money may be withdrawn to purchase another asset that is exempt from the ODSP assets test (eg. home, primary vehicle, pre-paid funeral).

When inheritance is left not in a trust, a Shelter Trust can be created for the money within 6 months of receiving it. However, the month in which the money is received is not exempt and will count as income, which may make the recipient ineligible for ODSP in that month. \*\*It is possible to work out a way to delay the estate in order to deposit the money into a trust that will not affect eligibility for ODSP, but must work with the lawyer to find the best way to do this\*\*

Setting up a Shelter Trust can be done by the Beneficiary if they are capable (capability for doing this is held to a higher standard than for most other things).

A Shelter Trust MUST be kept separate from other funds so that ODSP can determine the exemption. ODSP requires yearly accounting for Shelter Trusts (list of transactions and balances in the trust) to monitor that the account is eligible to remain an exempt asset.

## Henson Trusts

- Testamentary – can only be set up as part of a will
- Fully discretionary – Beneficiary has no say in the time or amount of any payments, or what the money is used for
  - o This means the trust account is not considered a liquid asset
- May contain over \$100 000 and still be exempt from ODSP assets test
- There is no need to report accounting (lists of balances and transactions) to ODSP unless directly requested
- The money can be used for disability related expenses (eg. transportation to treatment) and some other items with preapproval by ODSP (eg. bed, food, exempt assets etc.)

Estate planning is important, especially when including a Henson Trust. The legal language must be very specific and the documents must be drafted properly, or the trust could be rejected which could be very bad for the Beneficiary, as they may lose their ODSP entitlements.

Additionally, a second beneficiary should be named at the outset to allow the funds to transfer to someone else if the original Beneficiary dies before the trust is completely used.

Choosing a trustworthy Trustee is especially important with a Henson Trust because they have complete control over the funds, which are intended to help the Beneficiary. It is also recommended that the Trustee consult with a lawyer who is knowledgeable about ODSP law.

It is advisable to have a few people named as trustees, in case anything happens to a single trustee. The trust can be set up so that all trustees must agree on the use of funds, or it may be set up that a majority vote determines how funds are used, or a single person acts as primary trustee and the others would only step in if the primary trustee could no longer perform their duty. If there are not alternate trustees appointed and the primary trustee can no longer manage the account, the case would be taken to court to determine who can control the account. This would mean a lot of money lost from the account, just to pay for the legal proceedings. A lawyer (ideally, one with extensive knowledge of ODSP legislation and policy) can be hired to act as trustee and their fees for managing the trust would be paid out of the funds in the trust account if other arrangements are not made.

## New Tax Rules

Beginning in 2016, there are significant changes to the way testamentary trust will be taxed (potentially including Henson Trusts).

Currently, the money withdrawn from a trust is taxed a significantly lower rate. Under the new legislation, this will be discontinued and trusts will be taxed at the top marginal rate (almost 50%).

However, Qualified Disability Trusts (QDT) will still be able to have the lower tax rates applied. Henson Trusts can become QDTs with a Disability Tax Certificate – the same approval you need to receive the Disability Tax Credit.

This can be difficult to attain, because the Beneficiary must prove that 90% of their daily life is affected by their disability. Rejections are common and not many people appeal that decision, but more should!

The Disability Tax Certificate must be followed up every year (in most cases) to determine that the disability is continually affecting 90% of daily living.

It is possible to qualify for the Disability Tax Certificate and not qualify for ODSP.

If you are approved for the Disability Tax Certificate, you then become eligible for many other benefits:

- The Disability Tax Credit – reduced income tax for person with a disability, or those supporting a person with a disability.
- Registered Disability Savings Plan – savings plan for an individual with a disability, with government contributions.
- Henson Trust QDT – same Henson trust, but still eligible for lower tax rates.

The RDSP and the Henson Trust can work together if you also have the Disability Tax Certificate, with proper planning.

Eg. the Henson Trust could make deposits into an RDSP, which would then attract government contributions into the RDSP account as well.

Siskinds Law Firm offers a flat rate fee (\$2000) for creation of wills which includes 2 wills, all powers of attorney (financial and medical), and setting up a Henson Trust, regardless of how long the entire process takes.

Daniel recommends TD bank as an ideal location for Henson Trust set up, because they offer the largest variety of financial opportunities.