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Q&A

ESTATE PLANNING FOR PEOPLE WITH DISABILITIES: WILLS & TRUSTS

What is Estate Planning?

Estate planning involves the management of your affairs in the case of your death or incapacity. The development of an estate plan may include preparing a Will and Powers of Attorney, making choices about how you own property, making gifts or loans during your lifetime, and implementing tax planning strategies.

WILLS

What is a Will?

A Will is a legal document that provides instructions for your affairs upon your death, including who should receive your assets. The Will appoints a legal representative, known as an Executor or Estate Trustee, to manage your affairs and only takes effect only upon the date of your death.

Who can make a Will?

Any person over the age of 18 can make a Will, as long as they have "testamentary capacity." This means that the person has the ability to (a) understand the extent of their property (real estate, cash, investments personal items, etc.); (b) understand the act of making a Will and providing directions in the Will; (c) appreciate any claims that others may have on them (such as family members or dependents); and (d) be of sound mind, meaning that no delusions influence the making of the Will.

Why should I make a Will?

Making a Will is the best way to ensure that your affairs are handled in the manner that you wish after your death. Your Will can name who will be responsible for managing your affairs, and who will receive your assets and on what conditions. A Will may will also to help lessen any family disputes and with proper planning, reduce or avoid any taxes paid upon your death.

What happens if I don't have a Will?

If you die without a Will, any assets you own or are in your name will be divided according to the law (i.e. according to the rules of intestacy), meaning that your assets will likely be distributed to your next of kin. Any family members or friends will have to apply to the court in order to administer your estate. Your estate may also face higher income tax and estate administration tax than it would have faced with proper estate planning.

What if I have a family member with a disability?

For parents and caregivers of persons with a disability, your Will can protect the financial arrangements you have made for your family member and ensure that his or her eligibility for government benefits, such as Ontario Disability Support Plan (ODSP) benefits, are maintained. You can also ensure that your family member's finances are managed so as to promote an enhanced quality of life. If your family member with a disability receives ODSP benefits, you may also consider leaving funds for them in a Henson Trust.

TRUSTS

What is a Trust?

A trust is a legal arrangement that exists when a person (the "Settlor") gives property to another person (the "Trustee") to hold "in trust" (i.e. invest and manage) for someone's benefit (the "Beneficiary"). For example, a parent (the Settlor) may leave property, such as cash or real estate, to a relative (the Trustee) to hold in trust for a child with a disability (the Beneficiary.) A trust allows the Settlor to give a gift while retaining control over how the gift is transferred, how and when it is used by the Beneficiary, and who will receive the gift if the Beneficiary passes away before using the entire gift.

What is a Henson Trust?

The most well-known and commonly used Trust among families of people with disabilities is an "Absolute Discretionary Trust", more commonly known as the "Henson Trust". The Henson Trust is a special type of Trust arrangement in which the Beneficiary is considered not to have any legal claim or control to the property held

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in Trust, and therefore, the property is not considered an asset of the Beneficiary when determining eligibility for ODSP. In short, any amount in the Henson Trust will not affect the Beneficiary's ODSP benefits.

How do I set up a Henson Trust?

Usually, a Henson Trust is set up in your Will, and is established when you (and possibly your spouse) pass away. Any inheritance received by the person with a disability will be transferred to the Henson Trust, thereby protecting eligibility for their ODSP benefits. A Henson Trust can also be established while you are alive (referred to as an inter vivos trust). We would recommend that you seek legal advice when setting up a Henson Trust, as doing so may have tax implications.

Who do I choose as trustee of the Henson Trust?

The trustee of the Henson Trust will be responsible for managing the trust and disbursing funds to your family member with a disability over their lifetime. When choosing a trustee, look for someone who is honest and trustworthy, is involved in your family member's life, is similar in age to your family member, and is willing to seek professional advice (lawyer, accountant, etc.) when necessary.

What is the monetary limit in a Henson Trust?

No monetary limit applies to the amount funds held in a Henson Trust.

How much can be withdrawn from a Henson Trust?

According to current ODSP regulations, $10,000 can be withdrawn from the Henson Trust in a 12-month period without affecting ODSP benefits. However, withdrawals from the Henson Trust made for approved disability-related expenses are exempt (not counted) for ODSP purposes.