

Leaving an inheritance to a person with disabilities – Henson trusts and other considerations

If you would like to leave some money or assets to a loved one who is living with disabilities when you die, be sure to consider how receiving that inheritance might impact that person's other financial resources, such as social assistance benefits.

In this article we will discuss:

- 1 Henson Trusts
- 2 Qualifying Disability Trusts (QDTs)
- 3 Estate planning considerations
- 4 Registered Disability Savings Plans (RDSPs)

Henson trusts can protect access to social assistance benefits

Every province and territory has its own specific laws and regulations addressing social assistance and support programs, and most have programs directed solely at persons with disabilities. The benefits provided can include a monthly stipend, specialized or subsidized housing, and/or medical benefits. In order to qualify to receive this assistance, the person must show that he or she is “disabled”, and that he or she is in “need”, as defined in the applicable legislation.

In general, a person will not be considered in “need”, and therefore will not be eligible to receive disability social assistance, unless the person meets certain asset and/or income tests. If the person inherits a significant sum of money directly (as opposed to indirectly, as a beneficiary of a trust), the inheritance could disqualify the person from continued assistance.

In most provinces and territories, if an inheritance is payable to a trust for the person with disabilities instead of directly to that person, and the terms of the trust are sufficiently “discretionary”, the assets within the trust will not be considered to be assets of the person with disabilities, and so will not affect his or her entitlement to government social assistance programs. The trust may also be permitted to distribute up to certain annual amounts to the beneficiary without those distributions counting against his or her income limit.

As a result, if one of your intended beneficiaries is receiving social assistance benefits, it is usually best to leave assets to him or her through a fully discretionary trust, sometimes referred to as a Henson trust, instead of leaving assets directly to him or her. This is a type of trust where the trustee (as designated in your will) manages the assets for the benefit of the beneficiary, but the assets are not legally owned by the beneficiary, and the trustee has the complete discretion to determine if, when and how much should be distributed to the beneficiary at any given time.

Henson trusts are useful even if social assistance benefits are not a concern

Even if the beneficiary with disabilities is not currently receiving (and does not in future expect to receive) social assistance benefits, or resides in a province or territory where discretionary trusts do not provide significant protection from an asset- and/or income-test, there may be other reasons to use a discretionary trust for that person's inheritance. For example, if you want to leave assets to a beneficiary with disabilities who is still a minor, or who is mentally impaired, or financially irresponsible, then using a trust will allow you to appoint someone (i.e. the trustee) who will manage that inheritance. If the person with disabilities is very dependent on caregivers, he or she might be vulnerable to financial abuse; appointing a trustee to manage their inheritance may help to reduce instances of financial abuse. Further, using a discretionary trust may protect the assets within the trust from claims by a creditor or separated spouse.

Typical terms in a Henson trust

In order to qualify as a Henson trust, the trust terms should include, among other things, the following provisions:

- The trustee must have complete discretion to decide if, when, and how much to pay from the trust income and/or the trust capital to the beneficiary with disabilities (the "primary beneficiary").
- The primary beneficiary must have no vested rights in any of the trust income or capital.
- The trust must describe who will receive what remains of the trust property upon the death of the primary beneficiary (the "residual beneficiaries").
- The trustee must have the authority to deviate from the "even hand" rule that usually binds trustees, so that the trustee can make decisions that benefit the primary beneficiary at the expense of the residual beneficiaries, even to the extent of potentially distributing all the trust capital to the primary beneficiary, if the trustee thinks it appropriate.

The trustee of the Henson trust does not have to be the same person that you appointed as executor or liquidator of your will, but it can be.

Who should be the trustee of the Henson trust?

The trustee of the Henson trust you establish in your will does not have to be the same person that you appointed as executor or liquidator of your will, but it can be. Either way, remember that the trust is designed to last for the lifetime of the primary beneficiary – this could be several decades. When appointing the trustee of this trust, you should consider appointing alternate trustees, in case the person you chose as primary trustee dies, resigns, or loses capacity before the trust has been wound up. The persons you choose as primary and alternate trustees should be mentally capable adults who are willing and able to act, who are trustworthy, and who have a relationship with the primary beneficiary or are willing to develop that relationship. Ideally, the trustees should reside in the same province or territory as the primary beneficiary. For Québec residents, trusts under the

Depending on your province or territory, it may be possible for a particular trust to be a Henson trust and a QDT at the same time.

Civil Code of Quebec require an independent trustee (essentially this means there must be at least one trustee who is not a beneficiary, nor the settlor). If you do not know of anyone who might be able to act as trustee, consider appointing a corporate trustee.

What are qualifying disability trusts (QDTs)?

A qualifying disability trusts (QDTs) is a type of trust that meets certain conditions set out in the Income Tax Act (Canada). Generally speaking, if a trust generates income that it is not paid or made payable to a trust beneficiary, that income is generally taxable to the trust at the top marginal tax rate for individuals in that province or territory. A trust that is also a QDT can have its income taxed at the same graduated rates of tax as are available to individuals. Among other things, to be a QDT:

- the trust must be testamentary (i.e. created as a consequence of the death of the settlor, typically by the terms of the settlor's will),
- at least one of the beneficiaries of the trust must:
 - qualify for the federal disability tax credit,
 - be specifically named as a beneficiary of the trust in the will, and
 - not already be the beneficiary of a different QDT, and
- the disabled beneficiary of the trust and the trustee of the trust must make a joint election with the Canada Revenue Agency to treat the trust as a QDT.

Depending on your province or territory, it may be possible for a particular trust to be a Henson trust and a QDT at the same time. Speak to your IG Consultant and/or legal advisor about whether Henson trusts and/or QDTs have a place in your estate plan.

Coordinate the estate plan and avoid using direct beneficiary designations

If your estate plan involves the use of a trust (whether a fully discretionary trust or otherwise) for the inheritance of a person with disabilities, then you should not designate that individual as direct beneficiary to any plans or policies, and if you reside in a common-law province or territory, you should not own assets in joint tenancy with him or her. Quebec residents should also avoid to own assets jointly with a person with disabilities.¹

You will generally want assets to flow into your estate so that the trust conditions contained in your will apply to those assets. Assets flowing outside of the estate will not be subject to the terms and conditions of your will.

For that matter, if you are planning to leave some money to a person with disabilities and some money to one or more other persons, then you should avoid directly designating any of these persons as direct beneficiary or owning assets jointly with any of them. If you reside in a common-law province or territory, you might reduce the probate fees that would apply on your death, but you might then inadvertently dilute the inheritance of the person with disabilities.

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Consider RDSPs

Registered Disability Savings Plans (RDSPs) are savings plans designed for the long-term financial security of persons with disabilities. Contributions up to certain annual limits may be eligible for federal grants, and RDSPs for beneficiaries with a low income may qualify for federal bonds.ⁱⁱ An RDSP may be established for a beneficiary who:

- Is eligible for the federal disability tax credit,
- Is a resident of Canada,
- Has a valid Social Insurance Number, and
- Is turning 59 or younger.

RDSP contributions can be made until the end of the year the beneficiary turns 59, but grants and bonds can only be received in years when the beneficiary turns 49 or younger.

RDSPs can receive up to \$200,000 in private contributions, up to \$70,000 in federal grants, and up to \$20,000 in federal bonds. Most provinces and territories fully or at least partially exempt the value of an RDSP from social assistance asset tests, and fully or partially exempt the value of RDSP withdrawals from income tests.

A large lump sum contribution to an RDSP may be disadvantageous, especially when it concerns the federal grants available. Typically, it is better to contribute to an RDSP gradually over time rather than all at once. Thus, if you are planning to leave an inheritance to a person with disabilities, you will likely still want to make use of a discretionary trust. The trustee will be able to use the trust funds to make RDSP contributions on behalf of the person where the trustee considers it appropriate.

Other resources

If you would like more information related to these topics, ask your IG Consultant for a copy of our Estate Planning Guide or RDSP brochure.

i Joint tenancy is not applicable in Quebec. Beneficiary designations cannot be made in Quebec except with respect to life insurance policies and qualifying annuities. In the rest of Canada, beneficiary designations can typically be made with respect to life insurance policies, RRSPs, RRIFs, TFSAs, pension plans, and locked-in accounts.

ii The Canada Disability Savings Grant (CDSG) and the Canada Disability Savings Bond (CDSB) are provided by the Government of Canada. Eligibility depends on family income levels. Speak to an IG Wealth Management Consultant about special RDSP rules; any redemption may require repayment of the CDSG and CDSB.



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