


Henson Trusts: Preserving an Inheritance for Someone Collecting a Disability Pension

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A common worry for many who provide financial support to a family member with a disability is how they will continue that support after their death. One notable option is to leave money in a trust. A Henson Trust will ensure that after you are gone, your family member will receive adequate financial support for the duration of his or her life, while at the same time maximizing the assistance provided by government agencies.

What is a Henson Trust?

In 1980 the Ontario Court of Appeal was asked to decide whether Mr. Henson's daughter, who was receiving a Family Benefits pension (today known as a "Disability Support" pension) from the provincial government, should be cut off from such benefits because her father left her an inheritance through a trust.

The Court decided that if the trust granted the trustee complete discretion over whether or not payments should be made to the disabled person, the Family Benefits pension could continue. It was ruled that the assets in the trust could not be considered hers since someone else was making the decisions about how to spend the money. She was therefore eligible to continue receiving government benefits. The special trust that Mr. Henson set up has become known as a "Henson Trust".

In summary, by utilizing a Henson Trust it is possible to successfully provide for a disabled family member and ensure that their government pension continues. In many cases this may be the best way to enhance their lifestyle and standard of living.

Setting up a Henson Trust

Most Henson Trusts are drafted into your Will and only take effect when you die, although it is possible to activate a Henson Trust while you are alive. In some limited cases a Henson Trust can also be created after your death and funded by your estate if you failed to draft one in your Will. The money for a Henson Trust comes from your estate or

from assets which may pass outside your estate, e.g. RRSPs and life insurance. Special trust declarations need to be signed before you die in order for such funding to be considered a Henson Trust after your death.

Ontario Disability Support Program (ODSP) and Henson Trusts

ODSP has several functions in relation to Henson Trusts. ODSP assesses individual or family needs and allocates funds accordingly. Specifically, a series of tests are administered to determine eligibility.

The "Assets Test" measures the individual's assets to ensure that a single person does not have more than \$5,000 worth of liquid assets. Certain assets are exempt from this calculation, for example, the home in which the disabled person lives and their automobile, if applicable. A Henson Trust under which the disabled person is named as a beneficiary would also be an exempt asset. You should become familiar with which assets qualify as exemptions in order to properly plan.

The second test to determine qualification is the "Needs Test". ODSP calculates individual or family needs by assessing the person's monthly expenses to arrive at a "budgetary entitlement". The specific needs that are taken into consideration include food, clothing, shelter, and medical expenses.

The last test is the "Income Test". ODSP will subtract the person's monthly income from their budgetary entitlement. If the person's income is higher than the budgetary entitlement, they do not qualify for ODSP.

ODSP benefits can total as much as \$12,000 a year plus drug and dental benefits. ODSP may cover the basic needs of housing, food, and medical expenses, however, not all expenses are covered. A Henson Trust will allow the trustee to spend up to \$6,000 on your relative during any consecutive 12-month period without affecting ODSP benefits.

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If payments from the Henson Trust are made for items or expenses considered “disability related expenses” then these payments will not count toward the \$6,000 limit. It is important to become familiar with these exempt expenses.

Does my financial profile have a bearing on whether to choose a Henson Trust?

Generally speaking, if the inheritance to which your family member would become entitled to is valued between \$5,000 and \$100,000, you should establish a Henson Trust.

If your estate would yield an inheritance above \$100,000, then you will need to consider the age of the family member and the nature of their disability in order to decide whether a Henson Trust is appropriate.

For example, if a Henson Trust of \$500,000 were established for your family member, it may not make sense to have him or her living at or slightly below the poverty line when a non-Henson Trust can support a much higher standard of living. Everyone’s circumstances are different and consulting with an advisor experienced in trust matters is critical.

What to consider when choosing a Trustee for a Henson Trust

Choosing a trustee to manage your Henson Trust is a crucial decision. The discretionary nature of the Henson Trust means that the trustee has the significant responsibility of properly allocating the appropriate funds to the trust’s beneficiary.

When selecting a trustee, be sure he or she is familiar with the needs of the beneficiary and has a genuine concern for their health and welfare. The trustee must also be able to understand ODSP rules and how payments from the trust could affect the beneficiary’s ODSP benefits. Additionally, the trustee should be someone whom you feel will exercise good judgment, and will be prudent enough to seek sound investment, legal and accounting advice when needed.

Perhaps most critically, the trustee must be capable of acting completely impartially when it comes to deciding how much to pay out of the Henson Trust. In many cases, parents choose one of their other children as the trustee of the Henson Trust and that child–trustee may also be named as the “residual beneficiary” of the Henson Trust

(meaning the trustee is entitled to a portion of the Henson Trust left when the child with the disability dies). In this situation, you must feel confident that the chosen trustee will not be tempted to restrict payments from the Henson Trust in an attempt to benefit personally.

One way to avoid such a conflict of interest is to name a non-family member as a trustee or to name at least three trustees and require that a majority vote is needed for all decisions concerning the management of the Trust. Family members together with an outside professional, such as an accountant, financial advisor or a lawyer, may be an ideal choice. Alternatively, a trust company may be a good option.

Ultimately, choosing a Henson Trust will set your financial worry at ease and adequately secure your family member’s future. Make sure you plan carefully by getting professional help.

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