Succession Planning For Families with Disabled Dependants (Part 1): Overview

Leonard Henson had a very special last will and testament. It was designed to allow his disabled daughter, Audra, to benefit from his estate while preserving her entitlement to government assistance.

The will transferred his estate to three trustees to be held on behalf of Audra. It gave them the discretion to withhold or to spend the income and capital in whatever way would best serve her interests. Money from the trust could be used to buy her a television set, or new clothes, or pay for a chaperoned trip to visit a relative, all without disqualifying her from government support. What the will didn't do is give Audra a legal claim to demand money. This meant the government could not treat the money as hers after she inherited.

It worked. The government tried to withdraw Audra's social assistance after Leonard died, but the Ontario Court of Appeal ruled that Audra was eligible and ordered that the payments be reinstated.

It was a hollow victory for Audra – the court case took years and she had died before the Court of Appeal could rule in her favour. It was a significant victory for the disabled, however. The trust that Leonard Henson set up for Audra has come to be known, aptly, as a "Henson trust." It is important not only to understand the opportunity offered by Henson trusts, but also to understand that a Henson trust is only one part of the picture when estate planning for families with a disabled family member.

There are other critical issues that have to be considered. Consider the "Smith" Family. Mary Smith is 77 years old. She was widowed last year, leaving her as the sole remaining care-giver for her two permanently disabled sons, Ron and Mark. Both boys are in their forties. Neither will ever be independent. They live with Mary in the family home in Manitoba. She makes decisions for them, handles their money, and makes their breakfast each morning.

Who will make decisions for the boys if Mary has a stroke or dies? While Mary has always taken care of the boys, she has no real legal authority to do so. There is no court order. After the boys turned 18 Mary simply kept on taking care of them. That will end the moment she dies or becomes incapacitated. Mary decides not to wait until it happens. She is lucky enough to have a tight extended family and a younger brother and a nephew who would be willing to step in and help. An application is made to have Mary, her brother and her nephew appointed as joint substitute decision makers or "SDM's" for the boys. If Mary dies, her brother and nephew simply continue as SDM's: no crisis, no interruption.

Who will manage the boys' money if Mary can't? Ron and Mark receive social assistance from the provincial government. They also have jobs through a government program that gets them out of the home and into a government-sponsored workplace. The pay is nominal, unless you include the self-esteem they gain. Mary currently handles their money, and spends it on them before it builds up and interferes with their eligibility for social assistance. The application to have Mary, her brother and her nephew appointed as SDM's can, as an option, extend not only to personal decisions for the boys but also to authority over the boys' property. Thus, Mary, her brother and her nephew are becoming the joint SDM's over the boys' persons and over their money in one concurrent application. Mary does most, but not all of the work for now. She is grooming her brother and nephew and they will be able to take over and handle the boys' money when the time comes.

Who will put breakfast on the table on the morning after Mary has a stroke or dies? Routine is important to the boys. Mark eats oatmeal every morning, Ron eats toast. Mary has to make sure that someone will be there to cook, and clean, and take care of the day-to-day needs of the boys. Her first preference would be to keep them in the home. They have lived there all of their lives. She decides to talk to the boys – for the first time ever on the topic – and they surprise her by saying that they would not want to live in the house if she were gone. She makes arrangements for a trial stay in a group home. She is there to hold their hands. A good thing too -- it turns out to be a disaster. She quickly goes back to her initial plan, to keep them in the home where they grew up. The boys move back, government

homecare workers are enlisted, and those workers now provide respite in the home. They are building a relationship with the boys. They know what Mark and Ron have for breakfast. It isn't perfect. Yet Mary is now hopeful, and if she dies tomorrow there is a workable arrangement in place and ready to be implemented.

Will the boys be denied the benefits of Mary's money if she has a stroke? Like Leonard Henson, Mary uses her own money to improve the lives of the boys. That will end if Mary becomes incapacitated. A person appointed by Mary under an off-the-rack power of attorney will discover that he or she cannot legally make gifts of Mary's money. The attorney is obliged to spend Mary's money for Mary's benefit and her benefit only. Mary wants her money spent on the boys, even if she is forced to go short. She considers two planning options.

The first is a tailor-made power of attorney that contains express wording directing the attorney to spend the money on the boys, even if it cuts into money that might be needed for Mary in the future. This is an inexpensive solution, and easily done with a lawyer who understands the issue. The downside? Even if properly worded, her lawyer is unable to point to any legal authority supporting the idea that an attorney can make gifts for the boys if it is taking future bread out of Mary's mouth. This is a legal gray area. Mary is not comfortable with gray areas.

Second, she considers placing all of her property into an *inter vivos* trust. She would be the initial trustee, and her brother and her nephew joint alternates if Mary becomes incapacitated or dies. The income would be payable to Mary or the boys in whatever manner the trustees decide, and the buck will stop with them – they will be specifically authorized to spend money on the boys at Mary's expense.

The transfer of her assets into the trust will trigger a disposition for tax purposes, but Mary has little or no pent up capital gains to worry about. In common with most other personal trusts, all of the assets of the trust will be subject to a deemed disposition and reacquisition at fair market value every twenty-one years, thus harvesting any pent up capital gains. Mary would retain the discretion to withdraw capital. This triggers attribution rules under which all of the income generated

in the trust will be taxable to Mary. A particular downside: when she dies the property cannot be routed into a qualifying testamentary trust. Thus, future income would be taxed at the highest marginal income tax rate. If she leaves the assets in her name and routes them through her estate on her death, the trusts she will ultimately establish will qualify as testamentary trusts and will enjoy the benefits of graduated tax rates. Mary opts for the custom power of attorney instead of the *inter vivos* trust.

How will Mary's money be handled after she dies? She executes a will containing a testamentary Henson trust for each of the boys. This will protect their government support unless the law changes. The trust income will be taxed at graduated rates (more about that in a later article).

Mary loves her boys. She is asking all the right questions. She is making arrangements in advance. She is testing everything. The day after Mary dies or suffers a stroke, breakfast in the Smith household will be served as usual.

This is the first part of a four part series on planning for the disabled. It is an introduction to the topic, is general in nature, and is not a substitute for legal advice. Individuals planning to structure or restructure their affairs should consult a lawyer for assistance specific to their needs and circumstances.

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