Succession Planning For Families with Disabled Dependants (Part 3): More Things You Need To Know About Trusts For The Disabled.

The last article in this series introduced the reader to workings of Henson trusts and detailed the federal income tax treatment Henson trusts received. There are other things that a person needs to know as they set up a trust for a disabled beneficiary.

Henson trusts are fragile. To the extent that a trust for the disabled is used to preserve access to programming and social assistance paid by the provincial or territorial or government in question, the structure is fragile. A simple regulation change is often all that has to occur to end the beneficiary's entitlement for government support. Those regulation changes can apply equally to the existing trusts and future trusts. Thus, a person having set up a Henson trust may discover that the government unilaterally defeats the purpose of the trust by making a subsequent regulation change.

What works in one province does not necessarily work in another. A Henson trust allows continuing eligibility for support and programming by working around legislative and regulatory schemes. Thus, it is a matter of provincial law and the experience has been different in different provinces and territories across Canada. In Alberta, for example, regulatory changes that were put in place on October 1, 1999, did away with Henson trusts in that province. Legal commentators in the North West Territories and Nunavut have suggested that their current laws may not permit continued eligibility for government support when a disabled person is the beneficiary of a discretionary trust. Regardless of the jurisdiction, the laws that apply have been subject to frequent change and a lawyer specializing in this area should be consulted whenever such a structure is to be put in place.

Regulatory changes in Manitoba announced in April of 2003 give rise to new opportunities. The changes made last spring did not do away with Henson trusts here in Manitoba. Instead, they gave rise to two opportunities.

First, the changes allow for a disabled person to set up trust for themselves and continue their eligibility for provincial government support and programming, but only on the proviso that they have less than $100,000,00

in capital available to them. This allows for them to receive a small windfall, like an inheritance or, at least in some circumstances, a personal injury award and maintain government eligibility by setting up a trust. This kind of "self-starter trust" will be dealt with at greater length in another article in this series. This is slightly different from a Henson trust situation. In a Henson trust situation the disabled person never owns the money. The money is the property of a parent or sibling or some other relative, who then settles the money into a Henson trust for the benefit of the disabled person. What is more, a Henson trust does not have the same $100,000.00 cap.

Second, the self-starter trusts are given very liberal treatment under the new regulations. Money in the self-starter trust can be used for a variety of ways to benefit the disabled person. The old regulations that will continue to apply to traditional Henson trusts are not as liberal. While they have been generously interpreted and applied by the provincial government over the years, the old regulations do not allow for the same ability to make disability related outlays for the disabled person, and contain more restrictive wording applicable to calculating a person's eligibility for liquid asset exemptions.

The regulation changes may suggest an improved structure. The second point referred to above has led to the conclusion that a Henson trust should be set up to allow for the possibility of a $100,000.00 capital gift to be carved off of the larger inheritance amount and be given to the disabled beneficiary, thereby entitling him or her to set up their own self-starter. The self-starter would then exist in tandem with the Henson trust. Consider the following situation as an example. David inherits $500K in a traditional Henson trust when his father dies. The terms of the trust allow the trustees to make a gift of capital to David of $100,000. The gift is made to David, and then a self-starter trust is established on his behalf. David is now the beneficiary of two trusts. The first is the testamentary Henson trust established for him by his father, containing the remaining $400,000 of the original $500,000 inheritance. It will get the better income tax treatment of the two trusts. The second is the self-starter David was able to set up for himself. It is allows for more liberal encroachment for David's benefit. David is still eligible for continued government support.

All of this may herald an attack on existing structures. A cynical commentator might conclude that the regulation changes here in Manitoba open the door to a more restrictive approach on existing trust structures. The government can now, if it chooses to step up enforcement of the old

regulations, clamp down on existing Henson trust structures. Again, this suggests that estate planners should ensure that their structures allow for the establishment of self-starter trusts where applicable.

Henson trusts have been controversial. Why? The structure can be used for recipients of social assistance who are able-bodied and mentally capable, not just for disabled persons. Anyone, whether disabled or not, can be the beneficiary of a fully discretionary trust and, because they cannot be said to own the money, they remain eligible for social assistance and other government programs. Under that type of scenario, the contents of their trust might be held and allowed to build for a decade or two with very limited efforts to spend the money on the beneficiary's behalf. At the end of that decade or two, and after the trust was large enough, the trustees could start paying out the income on a regular basis to the beneficiary or for their benefit. That steady flow of income would disqualify the individual to social assistance at that point, but the government would have subsidized the beneficiary during the decade or two that was required to grow the trust. This strategy has attracted critics, and some provinces have tightened down the regulations to make this less available.

Consider a quick survey of laws across Canada. The table that follows details the availability of Henson trusts in the various provinces and territories of Canada. Disabled persons would be well advised to avoid moving to Alberta, the North West Territories or Nunavut. Clients should bear in mind that their wills may need to be rewritten if they or their beneficiaries change their province or territory of residence. The table also provides some detail relating to the laws that apply to decision making for the vulnerable persons, a topic dealt with in some detail in an earlier article in this series.

Province	Status of Henson trust	Title of personal decision maker/statute	Title of financial decision maker/statute	Source (lawyer and firm name)
Alberta	**Defunct** **October 1, 1999 changes to Assured Income for the Severely Handicapped Act - Some planning opportunities may still exist**	**Guardian** **The Dependent Adults Act**	**Trustee** **The Dependent Adults Act**	**Douglas G. Gorman** **Davis & Company,** **(780) 426-5330**
British	**Alive and well**	**Committee of**	**Committee of**	**Lauren Blake-**

Columbia		the Person The Patients Property Act or Representative for Health Care The Representation Agreement Act	Finances The Patients Property Act or Representative for Finances The Representation Agreement Act	Borrell Davis & Company (604) 643-2957
Manitoba	Alive and well April 2003 regulation change expands availability	Substitute Decision Maker For The Person The Vulnerable Persons Living With a Mental Disability Act	Substitute Decision Maker For Property The Vulnerable Persons Living With a Mental Disability Act	John E.S. Poyser Inkster Christie Hughes, (204) 947-6801
New Brunswick	Alive and well	Attorney for Personal Care The Infirm Persons Act	Attorney The Property Act	Gerald S. McMackin Stewart McKelvey Stirling Scales (506) 632-2768
Newfoundland and Labrador	Challenged Any trust settled with more than $100,000 makes beneficiary ineligible for government support	Substitute Decision Maker The Advance Health Care Directives Act	Guardian The Mentally Disabled Persons' Estates Act	Meg Gillies Stewart McKelvey Stirling Scales (709) 570-8840
Northwest Territories and Nunavut	Challenged Current laws may not permit Henson Trusts, and no test case as of yet	Guardian The Guardianship and Trustee Act	Trustee The Guardianship and Trustee Act	Cynthia Levy Davis & Company, (867) 669-8402
Nova Scotia	Alive and well	Guardian of the Person The Incompetent Persons Act	Guardian of the Estate The Incompetent Persons Act	Timothy C. Matthews Stewart McKelvey Stirling Scales

				(902) 420-3325
Ontario	Alive and well	Attorney For Personal Care The Substitute Decisions Act	Attorney for Property The Substitute Decisions Act	Patricia Robinson Goodmans LLP (416) 324-9412
Prince Edward Island	Alive and well	Guardian of the Person The Adult Protection Act	Guardian of the Estate The Adult Protection Act	Thomas A. Matheson Cox Hanson O'Reilly Matheson (902) 894-7051
Saskatchewan	Alive and well Attack by government may be possible in some cases using dependents relief legislation, but untested in courts	Personal Decision Maker The Adult Guardianship and Co-decision-making Act	Property Decision-Maker The Adult Guardianship and Co-decision-making Act	George Nystrom Balfour Moss (306) 347-8392

Keeping on top of change. Clients who are very wealthy or who have disabled beneficiaries are very special. They need advanced level estate planning and, more to the point, need to keep on top of change. If the government changes tax-planning rules, the wealthy move quickly to retool their estate plans. If the government changes the laws relating to social assistance entitlement, clients with disabled beneficiaries may have to move as quickly, but they don't. How are they to know when the rules change?

First, they might join organizations (like Continuity Care) where families with disabled beneficiaries are given the chance to band together. Those types of organizations can often be relied on for newsletters and lectures on point, keeping the membership up to date on changes to the laws.

Second, they might look to their lawyers for notice of changes to the law. Here is the rub: the vast majority of lawyers have historically refused to make any effort to keep the clients apprised as to changes in law that might impact the clients' estate plans. Some lawyers who specialize in this area do make that effort, but they are few and far between. That remains true despite repeated articles that have been written for lawyers suggesting that

it may be time for the profession to start looking out for their clients on an ongoing basis, rather than simply taking their fees and forgetting about them after their wills have been signed. As is often the case, the rules seem to change for the wealthy. Their lawyers and accountants are eager to track tax law for them, and to advise them when changes occur that suggest improvements to their estate plans. Why should the preservation of wealth be more important than the protection of disabled beneficiaries?

This is the third 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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