

Estate Planning For the Disabled (Part 4): Postmortem Planning

Earlier articles in this series delved into the planning that can be done for families with disabled members. Some families blow it – mom and dad never get around to having a proper estate plan put in place, and then they die. What can be done to organize affairs for a disabled beneficiary after the family member has passed away?

Without proper planning, a disabled beneficiary may discover that they are cut off from income assistance from the provincial government, and are denied continuing eligibility to government programming for the disabled. The denial of programming is often a more critical threat than the loss of income. All of this is far from a desirable state of affairs, but there are some avenues that may be open to the family. Often referred to as “post-mortem planning” they include at least three mechanisms available in Manitoba.

Self-starter trusts under The Employment and Income Assistance Act

If a disabled individual inherits less than \$100,000, they may be able to place it into a trust that they establish themselves. This possibility also exists where they receive an amount less than \$100,000 as a gift, or as a lottery winning, or as a damage award received under certain types of court orders.

This is different than a Henson trust (discussed at length in earlier articles). A Henson trust is set up by a third party, such as an aunt or an uncle, and not by the disabled individual himself or herself. The disabled person never owns the money when a Henson trust is set up. A self-starter applies where the disabled individual receives the money and they own it. They simply have the opportunity to place it into a trust for their own benefit. Like a Henson trust, however, the disabled person retains their eligibility for government support and programming.

These trusts are governed by regulation 8.1 under *The Employment and Income Assistance Act* (Manitoba). If the person is physically disabled, they can set up the trust on their own. If they are mentally disabled and they are not able to handle their own financial affairs, then the trust can generally be established on their behalf by the decision maker appointed as a substitute decision maker or a committee or by an attorney appointed under a power of attorney signed by the disabled person while he or she was still capable of doing so. The income has to be paid out whenever it threatens to top \$100,000. The income and capital can be used for the benefit of the disabled person and to improve their lifestyle. The rules for that are set out in regulation 8.1, and on their face allow more generous access to funds than would technically be possible with a Henson trust.

These trusts will be taxed as *inter vivos* trusts. This was discussed in earlier articles in this series and means the trust will be taxed at the top rate on every dollar of income it earns and retains. They are not nearly as tax-efficient as a Henson trust set up under a family member's last will and testament. It should be possible, however, to take advantage of the preferred beneficiary election under *The Income Tax Act* (Canada) to soften that otherwise tough tax treatment (also discussed in earlier articles).

Court-imposed trusts under The Trustee Act

Where a disabled individual inherits and the will does not contain a trust for their benefit, a solution may be available through the court system. The Court of Queen's Bench here in Manitoba has the power under Section 59(10) of *The Trustee Act* (Manitoba) to impose the terms of a trust for the benefit of the incapacitated person.

Under those circumstances, the judge is asked to write the terms of the trust. The judge can be expected to allow the government of Manitoba to attend the

court hearing and argue about how the trust should be structured. In past, the provincial government has convinced the court that similar kinds of trusts should be structured to include a mandatory monthly payment to the disabled beneficiary. If the amount is low, that may cause social assistance claw-back. If the amount is high, it may make the disabled person completely ineligible for continuing government support and programming until the trust is fully paid out.

Current indications from the court and from Canada Revenue Agency suggest that a trust imposed under *The Trustee Act* will receive poor income tax treatment as *inter vivos*. Like a self-starter trust, the negative impact of that can be lessened by using the preferred beneficiary election.

At least on paper, the rules allowing for the release of income and capital for the disabled beneficiary appear to be more restrictive for this kind of trust than would be the case for a self-starter (discussed above).

Court-imposed trusts under The Dependants Relief Act

There is a second set of laws here in Manitoba that allow a court to set up a trust for a disabled person. If the disabled person brings a claim against the estate as a "dependant" under *The Dependants Relief Act* (Manitoba), the court in Manitoba can order that any money due to them under that claim be held in trust. The judge decides on the terms of that trust. This will only be readily available in a limited set of circumstances. Those circumstances occur where the disabled person was cut off under the deceased's will, but was dependant on them for support at their death. In circumstances where the disabled person was, in fact, remembered under the will and is to receive a bequest, it may not be readily available (even if the dependant can convince the court to give them an extra amount from the estate to top up the bequest they receive under the will).

Like a trust set up under *The Trustee Act*, the judge gets to write the terms of the trust. The government can be expected to show up and argue for mandatory and regular payments out of the trust to the disabled individual. This type of judicially imposed trust will carry with it all of the disadvantages of a trust set up under *The Trustee Act* and is harder to set up. It does, however, have one advantage. It will receive the preferential tax treatment available to a testamentary trust under the *Income Tax Act (Canada)*. This means that it will be a more efficient tax structure than either of the trusts discussed earlier. If a large enough sum of money is at question, that preferential tax treatment can be a real advantage.

Post mortem planning is poor planning

Each of the post mortem options described above come with limitations and drawbacks. A parent or other family member who plans in advance can exert far more control over the outcome for their disabled heir. They can also save money. Post mortem planning can generally be expected to be five to ten times more expensive than the planning a careful parent does in advance.

Other considerations

Financial matters are only part of the picture. If the family failed to plan in advance, the disabled beneficiary may also be forced to accept hastily arranged arrangements for a replacement place to live, or may find that no-one is in place with legal authority to make decisions on their behalf, or find themselves divorced from the larger support network they were accustomed to (these issues were canvassed in the first article in this series).

This is the fourth and final part of this series on planning for the disabled. The constraints of space in writing the four articles have made it impossible to canvass all of the topics and issues of significant importance in this area. The articles are to be considered as an introduction to the topic, are general in nature,

and are 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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