Succession Planning For Families with Disabled Dependants

Part 1: An Overview

Leonard's Plan for his Daughter

Leonard Henson had a very special Last Will and Testament. It was designed to allow his disabled daughter, Audrey, 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 Audrey. It gave them the discretion to withhold or to spend the income and capital of the trust 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 did not do was give Audrey a legal claim to demand money. This meant the government could not treat the money as one of Audrey's assets. Therefore Audrey should still qualify for government support.

Leonard Henson's plan worked. However, this did not happen without a fight. Initially the government tried to withdraw Audrey's social assistance after Leonard died stating that Audrey should utilize the resources in the trust. The lower court didn't buy it, and stated that the trust is not one of Audrey's assets. The government then went to the Ontario Court of Appeal, but they again ruled that Audrey was eligible and ordered that the government support should remain.

It was a hollow victory for Audrey – the court case took years and she had died before the Court of Appeal could rule in her favour. However, it was a significant victory for the disabled. The trust that Leonard Henson set up for Audrey 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.

Plans for Every Family

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 caregiver for her two permanently disabled sons, Ron and Mark. Both sons 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. If nothing ever changes, then there should be no problem.

But who will make decisions for the boys if Mary has a stroke or dies?

While Mary has always taken care of her sons, she has no real legal authority to do so. Ron and Mark are legal adults when they turned 18. She has no court order to give her legal authority. After Ron and Mark turned 18, Mary simply kept on taking care of them. That will end the moment that she dies or becomes incapacitated.

Mary realizes this, and 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 "SDMs" for Ron and Mark. Now if Mary has legal authority over her sons, and just as importantly, when she dies, her brother and nephew simply continue as SDMs: no crisis, no interruption.

But who will manage the Ron's and Mark's 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 SDMs can, as an option, extend not only to personal decisions for Ron and Mark, but also to authority over their property. Thus, Mary, her brother and her nephew are becoming the joint SDMs over the boys' personal decisions and over their money in one concurrent application. Mary does most, but not all of the work for now. However, she is grooming her brother and nephew so that they will be able to take over and handle the boys' money when the time comes. So now there someone in place to help Ron and Mark with their personal and financial decisions when Mary can no longer do it.

But 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. They surprise her by saying that they would not want to live in the house if she were gone. So 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, which is to keep them in the home where they grew up. The boys move back home, and 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, and should be able to act in Mary's absence. It isn't perfect. Yet Mary is now hopeful that if she dies tomorrow, there is a workable arrangement in place, 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 option is a tailor-made power of attorney that contains express wording directing the attorney to spend her 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. This is a trust that she creates while she is alive. She would be the initial trustee, and her brother and her nephew would be joint alternate trustees if Mary becomes incapacitated or dies. The income would be payable to Mary and the boys in whatever manner the trustees decide, and the buck will stop with the trustees – the trustees 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. Similar to 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 during that period. Mary would retain the discretion to withdraw capital. This triggers attribution rules under which will mean that 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, then 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 Ron's and Mark's government support unless the law changes in the future. 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 to see what works. 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, and is general in nature. It 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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Tradition Law LLP Estates & Trusts, Winnipeg
jpoyser@traditionlaw.ca
(204) 947-6802

The Wealth and Estate Law Group, Calgary
jpoyser@welglawyers.ca
(403) 613-2128

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Succession Planning For Families with Disabled Dependants

Part 2: Henson Trusts

The last article in this series told the story of Leonard Henson, and introduced Henson trusts as one of the mainstays of estate planning for the disabled, as well as giving an overview of different situations to plan for before they occur. This article will focus on Henson trusts and give a more in-depth explanation.

Do Henson trusts work in Manitoba?

Yes. The viability of Henson trusts was tested and proven by our Court of Queen's Bench in the case, *Quinn vs. Manitoba (Executive Director of Social Services)*. Regulation changes in the April of 2003 did not do away with the availability of Henson trusts, but may herald more restrictive government treatment than that enjoyed in past (more on that in another article in this series).

How does a Henson trust work?

If a disabled beneficiary is in receipt of provincial government support, then they can have a trust established by a third party, such as a father or an aunt, and the beneficiary will retain their eligibility for government support. To be effective the trust has to be fully discretionary. The trustees must have the discretion to distribute income and capital from the trust as they see fit. It is the converse side of this discretion to give that is key: the trustees must have the power to *withhold* the income and capital. It is the power to withhold benefits which is the core of the Henson trust. The beneficiary gains no vested right to income or capital under the trust. The beneficiary cannot claim payments from the trust, they cannot demand them, and they do not, as a result, own the contents of the trust.

This generally dovetails with the government regulations that establish a disabled person's eligibility for government support. Those regulations provide that a person will qualify if they do not own significant assets or have significant income. The regulations allow for some money in hand, and does not hold it against a disabled person when a third party provides a discretionary benefit. Money from a discretionary trust can be used to pay for expenses on their behalf, such as trips, clothes, homecare attendants and the like. Their quality of life can be improved enormously and at the same time their government support and access to government programming continues.

This is a matter of provincial law and is not uniformly true across Canada (a topic dealt with at greater length in a later article in this series).

What income tax treatment does a Henson trust receive?

The tax treatment of a trust for the disabled person is generally the same as the tax treatment of any other trust, whether testamentary or *inter vivos.*

Here is a summary of the general tax rules that apply to trusts:

- A trust is a separate taxpayer and files its own tax return each year.

- Trusts of the kind discussed in this article are divided into two kinds for tax purposes, *inter vivos* trusts and testamentary trusts:

    - A testamentary trust is one that is established by a person at the moment they die, and is generally (although not exclusively) created under the terms of their will.
    - An *inter vivos* trust is defined for tax purposes as any personal trust that does not qualify as a testamentary trust but most *inter vivos* trusts are established by a person while they still are alive.

- Income earned by assets in a trust can be kept in the trust or paid out to a beneficiary.

- If income is retained in the trust, then it will generally be taxed in the hands of the trust on the trust's tax return.

- The tax rate depends on the type of trust:

    - If the trust is *inter vivos*, then every dollar of retained income is taxed at the highest tax rate. That is a disadvantage. Generally, *inter vivos* trusts are considered tax inefficient.
    - If the trust is testamentary, then the income is taxed at graduated rates, like your taxes and mine, such that the first portion of income is taxed at the lowest rates in the bottom tax bracket, with any additional income being taxed in the next bracket and so on with higher and higher rates being charged up the tax brackets. Access to lower tax rates is an advantage available to testamentary trusts.

- Income paid out of a trust to a beneficiary is generally taxed in the hands of the beneficiary.

Do Henson trusts get special tax treatment?

Yes. One of the general rules, as stated above, is that income retained in a trust will be taxed in the trust. When dealing with a trust for the disabled, that general rule is subject to one major exception: the preferred beneficiary election.

The preferred beneficiary election is available when the beneficiary of a trust is suffering from a mental or physical impairment within the meaning of the *Income Tax Act* (Canada). The impairment has to be severe and prolonged. Furthermore, the beneficiary of the trust has to be related to the person establishing the trust (referred to as the “settlor” in trust law). The beneficiary can be a spouse or common-law partner of the settlor (a former spouse or common-law partner qualifies as well), or can be a child, step-child, grandchild, step-grandchild, great grandchild or step-great grandchild of the settlor.

Where a person qualifies as a preferred beneficiary, a joint election can be filed in the tax return by the trust and the preferred beneficiary, or their legal decision maker. That election has the effect of taxing income amounts earned in the trust on the tax return of the beneficiary even though those amounts were retained in the trust, and were re-capitalized rather than being paid out to the beneficiary for his or her benefit. In short, the income stays in the trust but is taxed as if it had been paid out to the beneficiary.

The availability of the preferred beneficiary election will remove the tax inefficiency described earlier as a common impediment identified by planners when considering an *inter vivos* trust. Generally, an *inter vivos* trust is taxed on each dollar of income at the highest federal and provincial rate of tax. However, if the beneficiary of such a trust qualifies for the preferred beneficiary election, then the income of the trust can be retained by the trust but be taxed at the graduated rates that might be available to the beneficiary as a flesh and blood person. Because the income is only taxed in the hands of the beneficiary, and not received, that tax positioning should not interfere with social assistance entitlement.

In a testamentary trust, income can be split between the trust and the disabled beneficiary in such a way as to double access to the bottom tax bracket, even in circumstances where the individual receives provincial support and the income is actually retained within the trust rather than being given to the beneficiary. That, again, is the result of exercising the preferred beneficiary election in appropriate circumstances.

Other Opportunities

There are several planning opportunities available here. If a client has a modest amount of money and wants to settle it into a trust for a disabled beneficiary, then they can place a relatively modest amount in a trust, whether *inter vivos* or testamentary, and improve the lifestyle of that beneficiary while sustaining their provincial entitlement for government support. If regulations change, the individual might be cut off support until they drain the trust, but if regulations remain the same, then they can see a significant improvement in their style of living. The preferred beneficiary election, where available, will ensure that the income is always taxed under the graduated tax system, notwithstanding the fact that the trust might be set up *inter vivos*.

A client might settle a larger amount into a Henson trust and intend that it be used over the short-term to pay for extras and improve the standard of life for the disabled person. The long-term goal, however, might be to ultimately have that individual freed from government support and provided for at a higher level. A sum of money placed in a Henson trust and left to grow for a decade or two can become substantial. This is particularly the case if the preferred beneficiary election is available to double the allowable amount of income at the lowest tax brackets in each year, splitting income between the trust return and the return of the disabled beneficiary. At such time as the trustees conclude that the standard of living of the beneficiary can be significantly improved by sole reliance on funds within the trust, then the trustees simply begin to payout the income at a level that will disqualify ongoing social assistance. The idea here is to subsidize the growth of the assets in the trust with government support until the government can be relieved of its role in that regard entirely. This is an area where families are obliged to tread cautiously. There are some government programs that are only available to individuals who qualify for government support that are not available otherwise. These programs cannot be replaced. They cannot be purchased. Some families have significant wealth, and at the same time make carefully sure that a Henson trust is put in place for their disabled beneficiary. They do not want to lose access to programs that cannot be replaced.

This is the second of a four part series on planning for the disabled. It is an introduction to the topic, and is general in nature. It 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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Tradition Law LLP Estates & Trusts, Winnipeg
jpoyser@traditionlaw.ca
(204) 947-6802

The Wealth and Estate Law Group, Calgary
jpoyser@welglawyers.ca

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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 income tax treatment Henson trusts receive. There are other things that a person needs to know before they set up a trust for a disabled beneficiary.

Henson Trusts are Fragile

To the extent that a trust for a disabled person is used to preserve access to programming and social assistance paid by the provincial or territorial government in question, the structure is fragile. A simple regulation change by the government 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 were put in place on October 1, 1999, which did away with Henson trusts in that province. Legal commentators in the Northwest 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 gave rise to new opportunities

The changes gave rise to two opportunities. First, the changes allow for a disabled person to set up a 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 of capital available in them. This allows for the disabled person 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. When creating a Henson trust, 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. Furthermore, 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 in accordance to their liquid asset exemptions.

The Regulation Changes may Suggest an Improved Structure

The second point referred to above has led some people 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 $500,000 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 trust is the self-starter trust that 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. However, this route should be taken with caution, as the lifetime maximum contribution into a self-starter trust is $100,000. Therefore using the entire amount may not allow David to contribute other money he acquires. While he does not have much income, if he inherits $10,000 from a distant aunt, then he will not be able to put this money into a self-starter trust.

The Regulation Changes May Allow 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 are Henson trusts controversial? The structure can be used for recipients of social assistance who are both 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, then 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 Northwest 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 Columbia	**Alive and well**	**Committee of the Person** **The Patients Property Act** **or** **Representative for Health Care** **The Representation Agreement Act**	**Committee of Finances** **The Patients Property Act** **or** **Representative for Finances** **The Representation Agreement Act**	**Lauren Blake-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-**

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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. Similarly, if the government changes the laws relating to social assistance entitlement, then 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 family members are given the chance to band together. Those types of organizations can often be relied on for newsletters and lectures on point, keeping the members 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. While some lawyers who specialize in this area do make that effort, 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?

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Tradition Law LLP Estates & Trusts, Winnipeg
jpoyser@traditionlaw.ca
(204) 947-6802

The Wealth and Estate Law Group, Calgary
jpoyser@welglawyers.ca
(403) 613-2128

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Succession Planning For Families with Disabled Dependants

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 even if proper plans were not put in place. 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, then they may be able to place it into a trust that they establish themselves. This possibility also exists where they receive the amount 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 an aunt or a parent, 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 trust applies where the

disabled individual receives the money and they own it. They simply have the opportunity to afterward place it into a trust for their own benefit. Like a Henson trust, 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, then they can set up the trust on their own. If the person is mentally disabled and is not able to handle their own financial affairs, then the trust can generally established on their behalf by the person appointed as their 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 had the capacity and was 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 the otherwise tough tax treatment (also discussed in earlier articles).

Court-imposed trusts under The Trustee Act

Where a disabled individual inherits money, and the will does not contain a provision which will create a trust for their benefit, then 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. 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. Unlike trusts described above, these court-imposed trusts will give the disabled person a beneficial interest in the trust, and therefore may disqualify them for social assistance while assets exist in the trust.

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 an *inter vivos* trust. 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, even though the disabled person was dependent on the deceased prior for support at the time of the deceased's 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 attempt to treat the amount held in trust as an asset of the disable person. 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 more difficult 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 family member. They can also save money. Post mortem planning can generally be expected to be five to ten times more expensive than the planning that a careful parent does in advance.

Other considerations

Financial matters are only part of the picture. If the family failed to plan in advance, then 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 of articles 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, and are general in nature. They 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.

John Poyser is a partner with the Winnipeg Law firm Tradition Law LLP Estates and Trusts and is the principal of the Wealth and Estate Law Group, in Calgary.

His practice is limited to estate planning and estate litigation, primarily serving clients in Alberta Manitoba. The mainstays of his planning practice include strategies to reduce Canadian income tax, provincial probate tax, and U.S. estate tax, as well as planning for disabled heirs and in blended family situations. His litigation practice focuses on challenges to wealth transfers, by will, gift, or trust. He also provides consultation and external advice to litigants and their lawyers during estate litigation.

Nationally, he is a past chair of the Wills, Estates and Trusts Section of the Canadian Bar Association (the “CBA”), and is past Deputy Chair of the Canadian Branch of the Society of Estate and Trust Practitioners (“STEP”). Provincially, he is a past chair of the Wills and Estates Section of the Manitoba Bar Association, and a past chair of the Winnipeg Chapter of STEP. Internationally, he currently serves as a member of STEP Worldwide Council.

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