

ESTATE PLANNING FOR PEOPLE WITH DISABILITIES

Special estate planning considerations may be necessary for parents of disabled children and adults. The issues are many, and care must be taken to ensure that provisions in a will are appropriate, given the nature of the disability, the private means of the parents and any government assistance which may be available.

Disabled adults are generally eligible for allowances and other services as set out in the *Ontario Disability Support Program Act, 1997*. Ontario Disability Support Benefits are available on the basis of need for adults with disabilities. In order to qualify for such benefits, the person cannot exceed the asset limit set out in the legislation, and can receive only modest amounts of income, either directly, or indirectly from a trust, for things or services that are not directly disability related. If an adult beneficiary with a disability inherits assets directly, he or she will likely be disqualified from receiving government benefits, and will have to exhaust most of the inheritance before re-qualifying.

Disabled beneficiaries are usually the beneficiaries with the greatest need and, consequently, parents usually plan their financial affairs in such a way as to arrange for the care of a child with a disability from both private means and government benefits. As such, estate planning for the family will often include seeking ways to maximize and protect government assistance, while at the same time ensuring that the Wills provide adequate and proper support over the child's lifetime.

There are planning techniques parents of disabled children can use to protect the eligibility of a child, and at the same time provide additional benefits to the child. In these circumstances specific types of testamentary trusts can be considered. People who receive government benefits as the result of a disability may continue to qualify for benefits, in spite of the fact that they have an interest in certain trusts.

A Henson Trust is an absolute discretionary trust by which the trustees have complete discretion to decide to pay income and capital to or for the benefit of a beneficiary, or to decide not to make such payments, from time to time, solely in the trustees' discretion, subject to rules of trust law. This means that the beneficiary cannot compel the trustees to make payments and, therefore, the beneficiary does not have a liquid asset which would disentitle him or her to government benefits.

A \$100,000 Disability Expenses Trust will not disentitle the beneficiary to government assistance to the extent that payments from the trust, including both income and capital, are used only for disability related items, or approved services, education, and training related to the disability, the costs of administering the trust, and other payments not exceeding \$4,000. While this type of trust is often less flexible than a Henson Trust, parents may consider that such a trust offers more protection to the disabled beneficiary because the income must be paid out of the trust.

*If you have a disabled child and would like to discuss estate planning options, please call
Sharon Warden or Laura Wright at Warden Wright LLP.*

This article is intended to provide general information about the law. However, legal information is not the same as legal advice -- the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer to ensure that the information, and your interpretation of it, is appropriate to your particular situation.