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# Enhancing Quality of Life

for a Person with a Disability on  
ODSP Disability Benefits:

Inheritance & Henson Trusts

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## About our presenter...

Sallie Hunt is staff lawyer at Northwest Community Legal Clinic, a legal clinic that provides services for low income people in the Kenora and Rainy River Districts. Before coming to the clinic, she practiced family and criminal law in St. Catharines, Ontario and worked at the Law Society of Upper Canada and at Legal Aid Ontario in Toronto.



# TOPICS:

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- Inheritance as an Exempt Asset
- What is a Trust?
- Why leave a gift in a Will through a Trust?
- Various Trusts
- Henson Trust – a special type of Trust

# Exempt Income/Assets on ODSP

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- A single person on ODSP benefits is allowed to have Assets valued up to \$5,000, or \$7,500 for a couple or family
- Certain Assets are exempt – i.e., they do not count towards the \$5,000/\$7,500 maximum
- Trust funds from *insurance proceeds* or an *inheritance* are EXEMPT\*

\*To a Maximum of \$100,000

# Exempt Income/Assets on ODSP

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The focus of this webinar will be money from an *inheritance* left to a person receiving ODSP benefits.

We will look at the difference for someone on ODSP benefits between receiving:

- money from a Will left to that person **directly**, to money left through a **Trust**, and
- money left in an *ordinary Trust*, to money left through a *Henson Trust*.

# Trusts - What is a Trust?

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- A Trust is a financial arrangement, in which one person (the Trustee) looks after and is responsible for the Assets of the Trust (such as a bank account) for the benefit of another person (the Beneficiary). The Beneficiary of the Trust in this discussion is the person receiving ODSP benefits.
- The person setting up the Trust (the Settlor) can be a different person from the Trustee.
- Legal title to the Asset is held in the name of the Trustee, with or without specific instructions on how the property is to be used for the Beneficiary.

# Trusts - What is a Trust?

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- Sometimes the Trustee and Beneficiary can be the same person.
- As the name suggests, a Trust involves a trust-relationship between the Trustee and the Beneficiary of the Trust.
- The Trustee has a legal duty, known as a *Fiduciary Duty* – the Trustee must use the money in the Trust for the benefit of the Beneficiary.

# When is a Trust Exempt?

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- Anyone can set up a Trust for someone else.
- But, only under certain circumstances will a Trust set up for a Beneficiary on ODSP benefits be EXEMPT and fit under the ODSP Asset and Income Exemptions:

## Money from a Trust\*

- created from proceeds of a life insurance policy → Exempt Asset
- created through a Will (i.e. a Testamentary Trust) → Exempt Asset

\*To a Maximum of \$100,000

# Different Kinds of Trusts

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- LIVING TRUST or *Inter-Vivos Trust* – a Trust that is established for a Beneficiary by a Trustee who is still alive  
(NOT an Exempt Asset)
- TESTAMENTARY TRUST – a Trust\* that is set up for a Beneficiary through a Will
- SHELTER TRUST – Money inherited from a Will and paid **directly** to a Beneficiary on ODSP, who afterwards (within 6 months) puts the money into a Trust\*
- HENSON TRUST – also known as a *Discretionary Trust* – to be used when an inheritance is more than the allowed ODSP exempt maximum of \$100,000.

\*Exempt to a Maximum of \$100,000

# Trusts and ODSP

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A Testamentary Trust and a Shelter Trust are treated differently by ODSP:

- When a Will leaves an inheritance by placing it into a Trust for the Beneficiary on ODSP benefits = *Testamentary Trust*.
- If the *Testamentary Trust* is below the maximum (\$100,000), then all of the funds are Exempt as an Asset.
- The Beneficiary on ODSP can withdraw:
  - Funds of \$6,000 in any 12-month period,
  - More than the \$6,000 limit to purchase disability-related assets with ODSP's approval, or
  - More than the \$6,000 limit to purchase another exempt asset.

# Shelter Trust and ODSP

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- In a *Shelter Trust*, the Beneficiary receives the inheritance funds **directly** and afterwards puts the funds into a Trust\*.

\*To a Maximum of \$100,000

- Since a *Shelter Trust* is set up after a Beneficiary on ODSP has received funds from the Will:
  - The month that the inheritance is received is NOT Exempt
  - Funds received from the Will = Income in the Month Received
  - Funds are then Exempt as an Asset, provided that they are put into a Trust within 6 months.

# Shelter Trust and ODSP

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- For a *Shelter Trust*, the Beneficiary would go to a financial institution to set up a Trust account. The Beneficiary could decide to be both the Trustee and the Beneficiary – with or without any specific instructions, or arrange to have someone else to be the Trustee.
- This will satisfy ODSP because ODSP wants the inherited funds to be separated from the person's regular bank funds. Then it is easy to determine how much money is in the regular bank account.
- Once a Trust has been established, the Beneficiary has to provide the ODSP office with an annual accounting of the activity of money in and out of the Trust.

# Trusts & ODSP - Review

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- *Testamentary Trust*\* = All funds are exempt.
- *Shelter Trust*\* = Income in the Month Received, but then exempt if moved into a Trust within six months.
  - This means that the Beneficiary will not qualify for ODSP benefits for the month that the Beneficiary receives the inheritance funds.
  - An inheritance may give someone on ODSP one of the few opportunities to have extra funds for purchasing luxuries that could not otherwise be afforded. It seems unfair that the inheritance can be reduced by a month's worth of ODSP benefits because the Will did not establish a Trust for the inheritance.

\*To a Maximum of \$100,000

# Trusts and ODSP

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Third Situation (Not Covered by ODSP Policy):

o A Will has left money to a person on ODSP, but did not leave it in a Trust. The Executor/Estate Trustee, however, decides to establish a Trust\* for the Beneficiary on ODSP, and puts the Inheritance money into the Trust, instead of paying the funds directly to the Beneficiary.

o ODSP will say that this situation should be treated like a *Shelter Trust* (Income in the Month Received, but will then be exempt).

o I have had success arguing cases before the Social Benefits Tribunal that this is more akin to a *Testamentary Trust*, since the Beneficiary never received the funds **directly**. It is the Executor/Estate Trustee who had control of the funds and made the decision to place the funds in a Trust. Success with this argument means that funds are not considered to be Income in the Month Received and the person on ODSP does not lose one month of ODSP benefits.

\*To a Maximum of \$100,000.

# Trusts - Henson Trust

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An Inheritance of more than \$100,000 → is NOT an Exempt Asset because it is over the allowable ODSP maximum limit.

- A person on ODSP inheriting more than \$100,000 would be found to be financially ineligible for ODSP benefits.

UNLESS:

- A *Henson Trust* had been set up, and
- The *Henson Trust* **MUST** have been established in the Will.

# Trusts - Henson Trust

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A *Henson Trust* is also called a  
“*Discretionary Trust.*”

Because of its *discretionary nature*, the person on ODSP has NO SAY in how the Trust is managed.

The Trust is considered **not** to be an asset of the Beneficiary.

# Trusts - Henson Trust

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The Beneficiary has:

- NO control, nor direct access to the Trust
  - NO say about when money is taken out of the Trust
  - NO say about how much is taken out.
- o Payments and control of the Trust are at the *Absolute Discretion* of the Trustee.

# Trusts - Henson Trust

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- The Trustee has absolute control over the Trust, and any payments to the Beneficiary from the Trust are at the discretion of the Trustee, including the decision not to make a payment.
- Because payments and control of the Trust are at the *Absolute Discretion* of the Trustee, it is also called a *Discretionary Trust*.

# Trusts - Henson Trust

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*Henson Trust* is named after the person who first tried to establish such a Trust in the 1980s.

- Leonard Henson through his Will placed funds in an *absolute discretionary trust* for his daughter Audrey, who was receiving disability benefits under ODSP's previous legislation (the *Family Benefits Act*).
- When Mr. Henson died the Ministry stopped payments to Audrey, stating that the trust was a liquid asset.
- In 1989 the Ontario Court of Appeal upheld the decision that since the daughter had no right to demand payment from the trust, it could not be a liquid asset.

# Trusts - Henson Trust

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Because the person on ODSP has no control over the funds, ODSP will allow a person who inherits more than \$100,000 to stay on ODSP benefits, if:

- The Will stated that a Trust is to be established for the inheritance, and
- The Trust to be set up is a *Henson* or *Discretionary Trust*.

Without these safeguards, the person will no longer qualify for ODSP benefits.

# Trusts - Henson Trust

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A *Henson Trust* established through a Will passes wealth on without jeopardizing a person's eligibility or entitlement to ODSP benefits because of its *discretionary nature*.

- o The Trustee administering the Trust must be aware of relevant ODSP legislation and policy directives.
- o If the Trust allows, the Trustee can spend both the capital and income.

# Trusts - Henson Trust

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- A Henson Trust **MUST** be drafted properly to be *absolutely discretionary*.
- The Trust should state what happens to the Trust should the Beneficiary die, since no interest can *vest* in the Beneficiary.
- For this reason, the Trustee should not be a family member who could then inherit the Trust.
- It is also possible that there may be more than one beneficiary named in the Trust.
- As well, if the Trust is expected to last more than 21 years, alternate beneficiary/(ies) should be named to comply with the *Rule Against Perpetuities*.

# Henson Trust - Things to Think About

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The Trustee has a lot of power so:

- Consider appointing more than one Trustee.
- Consider the Trustee's Ability to:
  - Manage Trust
  - Understand terms of the Will and Trust
  - Understand ODSP Rules, Regulations and Policy Directives.

How well does the Trustee know the Beneficiary?

- Consider also, the trustworthiness of the person.

# Final Considerations

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Parents, siblings or spouses of persons on ODSP disability benefits have to plan ahead, to ensure that intended legacies for that person do not jeopardize the person's entitlement to ODSP benefits, nor reduce the amount of ODSP assistance.

As I have outlined, a simple Trust in a Will might suffice. However, depending on the size of the intended legacy, a *Henson* or *Discretionary Trust* may be necessary.

Bottom Line – Consult a lawyer familiar with estates and trusts to determine what would be appropriate to protect the legacy for the person receiving ODSP benefits.



# Resources:

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## *Ministry of Community and Social Services*

– *ODSP Act & Regulations:*

*Ontario Disability Support Program Act, 1997, S.O. 1997, C-25*

➤ *See s.5*

*ODSP, Ontario Regulation 222/98, General*

➤ *See ss.1; 11; 27; 28; 37; 38; 39; 42; 43 & 43.1*

– *ODSP – Clearing House Q&A:*

*Placing an Inheritance in Trust, Issue #766, July 16, 2003, Clearing House Q & A Response Sheet*

# Resources:

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*Ministry of Community and Social Services*

*– ODSP Policies – Income Support Directives:*

*4.1 – Definition & Treatment of Assets*

*4.7 – Funds Held in Trust*

*5.1 – Definition & Treatment of Income*

## Resources:

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*Advising the Ontario Disability Support Program Recipient or Applicant who has Received an Inheritance or Insurance Proceeds,*

By Harry Beatty, Barrister and Solicitor, July 2005

*Consider a Henson Trust,*

By Harry Beatty, Mary Louise Dickson, Q.C., John Stapleton, 2008, The Law Foundation of Ontario

<http://www.cleonet.ca/resources/1659>

## Resources:

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*Estate Planning for Beneficiaries with Disabilities in Ontario: Inheritances, Trusts and the Ontario Disability Support Program,*

By Harry Beatty, Barrister and Solicitor, July 2005

*Getting an inheritance when you are on Ontario disability benefits,*

Produced by **CLEO** (English and French versions)

<http://www.cleonet.ca/resources/431>

*Q & A Inheritance & ODSP,*

By Harry Beatty, May 2007

# Resources

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*The Wills Book* – Benefits, Wills, Trust and Personal Decisions Involving People with Disabilities in Ontario

By Mary Louise Dickson, Q.C., Rod Walsh, Orville Endicott, Ontario Association of Community Living (1999 edition – revised 2004)

The End

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