

ESTATE PLANNING

Providing for the Special Needs Beneficiary

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John Simpson has Down Syndrome. His parents, wanting to provide for him after their death, named John's sister Doreen as Executor of their estate and earmarked a proportion of the estate for his care. Now Doreen is shocked to find that because John is inheriting from their parents' estate, he is no longer entitled to the government benefits that she was counting on to pay his expenses.

Special estate planning considerations arise when a beneficiary is disabled and receiving government benefits. An outright bequest to the disabled beneficiary may inadvertently do more harm than good. Proper legal guidance is therefore essential.

Those who qualify for benefits under the Ontario Disability Support Program (ODSP) are usually adults (over 18 and under 65) who meet certain criteria set out in the applicable legislation and guidelines. The benefit is a subsistence amount.

Certain qualified ODSP recipients receive additional benefits, including coverage for expensive medical treatments and medications, and support for housing costs. If a parent leaves a child an inheritance directly, the child may no longer qualify for ODSP benefits. There are several legal approaches to this problem.

Henson Trusts

If the share of the parent's estate intended for the child with special needs is placed in a fully discretionary trust ("Henson Trust") instead of being given directly to the child, the money in that trust is not part of the means test under the ODSP plan. The trustee can distribute as much of the income and/or capital of the trust to or for the benefit of the child for the child's lifetime, as the trustee deems appropriate. The trustee can also ensure that any distribution the child receives from the trust remains within the ODSP-allowable amount.

The use of such a trust involves a great deal of planning, including an assessment of how much money should be set aside in the trust, how the fund will be managed and who will manage the trust.

Disability Expense Trusts

A disabled child may end up receiving an inheritance outright if a parent dies without a Will ("intestate") or, as in John's case, a parent leaves a direct gift to the child. The ODSP legislation allows the recipient of ODSP benefits to place such an inheritance or life insurance payout in a "Disability Expense Trust" provided that the proceeds put in the trust do not exceed \$100,000. Payments to the recipient from a

trust should not affect eligibility for ODSP, so long as they are used for approved disability-related items or services, or education or training expenses incurred because of a disability.

This solution is effective only where the inheritance is \$100,000 or less.

Registered Disability Savings Plans

The new Registered Disability Savings Plan became available as of December 1, 2008, under the new *Canada Disability Savings Act*. Provincial legislation is being introduced to exempt the assets held in such plans from the means test for ODSP, but this legislation is not yet in place.

A "holder" can set up the plan and designate a single, irrevocable beneficiary who would receive lifetime disability assistance payments from the plan. A beneficiary of an RDSP must qualify to receive a disability tax credit, be a resident of Canada, and have a severe and prolonged physical or mental impairment. An individual can be a beneficiary of only one RDSP at a time.

There are certain limitations to an RDSP, including the amount of funds that can be contributed to the plan over time and the requirements to qualify as a "holder".

When planning for the disposition of your estate, it is important to choose a lawyer with experience in all facets of estate planning. Give your lawyer all the pertinent details about your intended and potential beneficiaries, especially if one of them has special needs.

Lawrences' Estates and Trusts Group has significant experience in planning for special needs beneficiaries and would be glad to advise you in determining the best options for your particular estate plan.



Gosha Sekhon is an associate in Lawrences' Estates and Trusts Group. She advises Executors on all aspects of administering the estate of a deceased person and guides Attorneys for property and Attorneys for personal care when managing the affairs of a mentally incapacitated individual. Gosha can be reached at

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