Guide to Estate Planning

Disabled Beneficiaries

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Right-sized Thinking®

Disabled Beneficiaries

Start Now

When you have a child or family member who is disabled and/or receiving government benefits, special care and attention is required to ensure effective estate planning. There may be substantial costs incurred in looking after your son or daughter (*or other family member or loved one*) related to their disability. Government benefits (*currently Ontario Disability Support Plan "ODSP"*) are limited. Changes in legislation or government policy could affect the amount of benefits received and even whether or not the beneficiary is entitled to receive or continue to receive these benefits. Due to the uncertainty of government funding, it should not form the sole basis when planning for your disabled beneficiary's needs. It is essential to do whatever you can to make provision now to assist your beneficiary when you die.

What's At Risk

When planning for your disabled beneficiary, you must ensure that all provisions are structured properly taking into account the current "liquid asset" and income restrictions imposed on persons receiving ODSP benefits. If you don't, ODSP benefits could be lost or at least suspended until the "inheritance" has been spent.

This would mean that instead of being able to add to the available government benefits to improve your disabled beneficiary's comfort, care and enjoyment of life, the inheritance would be used up providing for day to day care.

When the monies from your estate for your loved one have been completely spent, there would be notdditional cash from your estate to assist your beneficiary, and they would only have the funds available from government benefits.

Only through careful estate planning can you preserve your disabled beneficiary's government benefits and at the same time add monies from your estate to assist with ongoing expenses and provide for some "extras" that will enhance quality of life.

Some Things That Won't Affect ODSP Benefits

(based on current legislation and regulations):

- Provision of a residence and payment of costs associated with this residence
- Payment for approved disability related expenses
- "Liquid assets" accumulated by a disabled beneficiary (*generally not exceeding $5,000 for a single individual*)
- Annual income received (*from all sources other than employment*) not exceeding $6,000
- Absolute discretionary trust. *If monies for your disabled beneficiary are placed in an absolute discretionary trust (also known as a "Henson Trust"), the executor or estate trustee of your estate can structure payments to or for your loved one so that there will be no reduction in ODSP benefits paid as a result of this inheritance.*

An Absolute Discretionary Trust:

- gives complete discretion to your executor or estate trustee in the amount to be paid to or for your disabled beneficiary
- allows the monies in the trust not to be deemed "liquid assets" and therefore they won't affect ODSP benefits
- allows payments to or for your disabled beneficiary to be structured ensuring that:
  a) the income received does not exceed the amount permitted under the ODSP regulations
  b) monies paid to beneficiaries do not result in accumulated "liquid assets" in his/her name that exceed the amount permitted under ODSP regulations
  c) allows your executor or estate trustee discretion to pay monies to provide a residence, to pay for approved disability related expenses, and also some additional monies to or for your disabled beneficiary for such things as vacations, entertainment or other things that may not qualify as "disability related expenses".

When Setting Up An Absolute Discretionary Trust Consider:

Who will administer the trust?

As this trust is intended to continue as long as your disabled beneficiary is living, provision should be made for successor trustee(s) or for how successor trustee(s) are selected.

Your trustee(s):

- should understand your disabled beneficiary's needs and be prepared to maintain regular contact with him/her

- be willing and able to keep up to date with government restrictions that affect the monies that can be paid from the trust for your disabled beneficiary
- must be selected to ensure that they are not in a conflict of interest with your disabled beneficiary

The amount of money or percentage of your estate to go into the trust

- Consider potential costs of providing for your disabled beneficiary
- Consider available resources (*assets in your estate, any insurance proceeds that will be payable on your death, anticipated government funding available, etc.*)
- Consider other beneficiaries, i.e., your disabled beneficiary may be only one of several children or other persons you wish to share in your estate (*and/or may be obligated to provide for*) and it is necessary to "balance" your provisions for everyone involved
- Are there monies to be paid from the trust for such things as providing a residence for your disabled beneficiary?

When the disabled beneficiary dies

- Consider who will be the beneficiary(ies) of the balance in the trust

Excess income

- Consider who should receive any income that may have been available but cannot be paid to your disabled beneficiary without impacting on his/her government benefits

Life insurance

- Consider using an absolute discretionary trust for insurance proceeds to avoid such proceeds from impacting your disabled beneficiary's government benefits

Establishing a Residence Trust

You may want to make provision in your Will for a residence for your disabled beneficiary. Some points to consider:

- Residence can be your existing home, a home purchased by your estate, or rented for your disabled beneficiary
- Funds available for this purpose
- Flexibility for change in circumstances, i.e., ability to sell/purchase a replacement property, ability to borrow funds for purchase (*consider how cost of borrowing will be repaid*)
- Maintenance costs – will these be paid from the absolute discretionary trust and/or the disabled beneficiary?
- Treatment of monies received from anyone else living in the residence and contributing by way of rent or other payment to ensure not attributed to the disabled beneficiary
- If the residence is owned, disposition of the proceeds if sold

Lifetime Benefit Trust

- It is now possible to give your Executor the discretion to use all or part of your RRSPs/RIFs to purchase a qualifying annuity with payments being made into a Lifetime Benefit Trust.
- Provided the trust provisions are drafted properly, this strategy allows your estate to defer the income tax otherwise payable on the deemed disposition of your RRSPs/RIFs, and protects the annuity payments from impacting your disabled beneficiary's government benefits.

Right-sized Thinking®

Consult With Someone Knowledgeable

- Language and set up of your estate plan are crucial to your ability to maximize funds available for your disabled beneficiary
- Take the time to understand government benefits available and how they work. Make sure your trustees are aware of the importance of doing so as well
- This is a specialized area and you must seek a lawyer experienced in these matters to help you implement your estate plan, ideally one who:
    - understands the dynamics of the family situation
    - has experience with estate planning for families with disabilities
    - demonstrates that they are current and understand all relevant legislation and regulations
    - is able to bring humanity and perspective to the planning process

For further information contact our Wills, Estates & Trusts Practice

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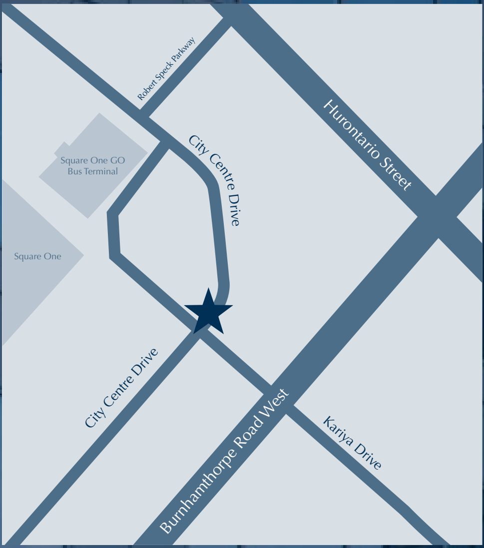

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