# Henson Trusts – Acting as a Trustee

## Definition of a "Trust"

One person or persons ("trustee") holding something, such as property or assets, for the benefit of someone else ("beneficiary").

## What is a Henson Trust?

A Henson trust is most often established on the death of a close relative or friend for someone with a disability. It is also possible to create a Henson trust during the lifetime of the donor (legally referred to as the "settlor"); however, this is less commonly done as such trusts (known as an "inter-vivos trusts") are subject to more restrictive tax rules. Generally, the purpose of a Henson trust is to provide financial assistance for an individual with a disability without risking his or her eligibility to the Ontario Disability Support Plan (ODSP) benefits. There is no limit on the assets that can be held by a Henson trust. Although not discussed in detail in this brochure, there is another type of trust with an asset limit of $100,000.00 which is similar to a Henson trust but much more limited. Such trusts are referred to as regulation trusts or protective trusts and may be set up to receive an inheritance if no Henson trust exists (because the person leaving the inheritance did not include a Henson trust in his or her Will) to hold the inheritance for the beneficiary with a disability.

## Obligations of a Trustee

The trustee of a Henson Trust has an overriding obligation to manage the trust assets for the benefit of the beneficiary or beneficiaries of the trust. The trustee must ensure that the trust assets are managed prudently and that any investments that are made comply with the requirements set out in the Will or other trust document and with any relevant legislation (such as the *Trustee Act*). It is highly recommended that the trustee work closely with a financial advisor, particularly where there are substantial trust assets. Depending upon the terms of the trust and other factors, the financial advisor's fees may be payable from the trust or may form part of the trustee's compensation.

## Record-Keeping

For more information about the accounting required and trustee compensation, please see our brochure entitled *Estate Accounting for Estate Trustees and Attorneys*. What follows is general information. The trustee must maintain up-to-date, detailed records tracking all transactions of the trust including receipts, disbursements, investments, etc. The records, referred to as the trust accounts, must be supported by documentation such as receipts, bank statements and investment statements. It is also recommended that a trustee keep copies of correspondence relating to the trust and a journal of all time spent by the trustee in carrying out his or her trustee duties. These records may have to be provided to an appropriate authority on request.

Trust accounting differs from tax accounting in several respects. For example, if the trust earns income which is not paid out to the beneficiaries of the trust, the income is returned to the trust as *capital*. This income needs to be tracked under trust accounting rules. It is advisable to seek professional advice to assist in complicated trust accounting matters.

## Audit or Review

The Canada Revenue Agency (CRA) has the right to audit the accounts of any trustee. The CRA requires that accurate and up-to-date records of the trust be kept. An audit is disruptive at the best of times. However, it will be especially time-consuming if the accounts and supporting records provided to the CRA are incomplete or inaccurate.

Ontario's Public Guardian and Trustee (PGT) may also have the right to review the accounts of a trustee. This can occur as a result of a complaint being made to them. Most often complaints are made by individuals who have concerns about the management of the trust, such as the beneficiary of the trust, a relative, care worker or someone from a public agency.

Any individual who has an interest in the assets of a trust has the right to demand that the trustee "pass his or her accounts". This is a court process where a judge approves the accounting records of a trustee. Please see our brochure entitled *Passing of Accounts* for more information.

## Tax Returns

The trustee of a trust must file annual T3 trust returns within 90 days of 'year end' if the trust has income to report. 'Year end' is the date that the trustee has chosen in consultation with a tax advisor and which cannot change once selected (unless a change is approved by CRA). The first year-end date can be any day of the year up to one year after the date of death of the person whose Will created the trust. To simplify the account reporting, a month-end or quarter-end date are often selected. It is strongly recommended that the trustee hire a tax accountant familiar with trust tax returns to ensure that tax filing rules are complied with and that the trust is as tax-efficient as possible. The accountant's fees are payable by the trust.

## Primary Beneficiary of a Henson Trust

Although more than one beneficiary is usually named in a Henson trust, it is generally the Will-maker's paramount intention that the funds be used only for the benefit of the trust beneficiary with a disability. If multiple beneficiaries are named, the beneficiaries who do not have a disability should not expect to receive anything from the trust as long as the beneficiary with a disability is alive and is in need. If the trust has income which must be paid out for tax reasons but which would exceed the ODSP limit, such income might be paid to other beneficiaries at the discretion of the trustee.

## ODSP Allowable Assets and Income

Currently, an individual receiving ODSP benefits is permitted to own assets up to a total value of $5,000 at any one time.

An individual receiving ODSP benefits is permitted to receive up to $5,000 additional income in any twelve-month period. The $5,000 total includes income from any source including monies from a Henson trust. For more information, please see our brochure entitled *General Information for Recipients of ODSP*.

## Payments to Beneficiaries

It is essential that a trustee of a Henson trust ensure that a beneficiary of the trust who receives ODSP receives no more than the $5,000 allowable limit in income in a twelve-month period. The trustee must therefore be aware of income that the beneficiary receives from all sources so that he or she can calculate how much to pay out to the beneficiary. The trustee must also pay special attention to the fact that the limit is $5,000 in any twelve month period, and not a calendar year.

### *Disability-Related Items and Services*

Despite the $5,000 income limit, there is no limitation on amounts of money paid to or for the individual with a disability for disability-related items or services. Any expenses associated with the purchase of these items or services may also be considered as approved disability-related items and services – e.g., repair costs, maintenance costs, installation and set-up costs.

### *Education and Training*

Unlimited amounts can be paid out of the trust for educational supports such as interpreters, attendants, and readers for an individual enrolled in continuing education. Payments can also be paid out of the trust for sign language, lip reading, and other disability-related training.

## Familiarity with ODSP Rules

In most circumstances, it is important that the trustee of a Henson trust not jeopardize the individual's eligibility for ODSP benefits. If the beneficiary loses his or her ODSP entitlement, there is no guarantee of future reinstatement into the program. Applying for reinstatement is a difficult and time-consuming process. In order to understand the income and assets that an individual with a disability is allowed, the trustee should review the ODSP rules and regulations or seek assistance from an advisor familiar with the rules and regulations. The official website of the Ministry of Community and Social Services (MCSS) is currently located at http://www.mcss.gov.on.ca/mcss/english/pillars/social/programs/odsp.htm and provides information about ODSP.

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*If you have questions or if you would like more information, please call us at 613-836-9915. This brochure is not intended to be legal advice but contains general information. Please consult a lawyer or other professional to determine how the information in this brochure might apply to you.*

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