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# Wills, Taxes and Estate Planning Law

Issues in Law You Need To Know

## Estate Planning and the Use of the Henson Trust and RDSP

*Many families include a disabled child or adult and the parents are usually the child's primary safety net. The onus is on the parents (or parent as the case may be) to provide core support to their children whether financial, physical or emotional and the list of duties for the disabled child may well escalate to a point where many are overwhelmed.*

The Ontario government can assist by offering a variety of valuable services that will assist the disabled child and his or her family. In Ontario, one can turn to the Ontario Disability Support Program (ODSP) which was established to help people with disabilities in financial need pay for living expenses such as food and housing.

Given the circumstance a child's disability will require lifelong treatment and support, a great concern for their parents is how to effectively plan for the care and protection for their child after the parents are no longer living. In fact, special considerations are necessary for parents of a disabled child or adult to ensure the child's ODSP's benefits are not compromised by their estate planning. This is a situation where guidance from a

professional advisor could provide great benefit.

### The Smith Family

As an example of an estate planning strategy involving a disabled child, I introduce the Smith family.

The Smiths have two children, Corey and Ryan, who are both over the age of majority. Ryan is a disabled child who receives ODSP benefits. The Smiths' combined Estate consists of their principal residence, RRSPs and other investments for a net value of \$1,000,000.

The Smiths are making their Wills and although they wish to have their Estate distributed in equal shares between their children their primary concern is to ensure that their estate planning does not disqualify Ryan from his ODSP benefits. They know the ODSP rules are complex.

What options are available to them?

### Henson Trust

The popular and preferred option is the use of an Absolute Discretionary Trust (commonly referred as a



“Henson Trust”) created under the parents' Wills. The Henson Trust allows their Estate Trustee, Corey, complete discretion over the trust so that he may continue to pay the necessary expenses of the disabled child. As a result of the Henson Trust, the Smiths have the assurance that Ryan shall be provided for in the years to come while knowing that he cannot compel Corey to make payments.

Ryan's ODSP benefits shall not be compromised since the funds held in the Henson Trust are not considered his assets for ODSP purposes; that is because Corey, as Estate Trustee, has absolute discretion in the management of the trust. Furthermore, Ryan's income from the Henson Trust for non-disability related expenses, such as food, clothing, housing and entertainment, can be substantially supplemented without suspending or affecting the ODSP benefits.

Also, depending on the parents' wishes and in appropriate circumstances, the Henson Trust may also allow for income sprinkling by empowering the Trustee to "sprinkle" income among several beneficiaries.

ODSP guidelines recognizes the Henson Trust as an exempt asset of the disabled child and as a result, it remains the most valuable option available as it represents a safety net for Ryan after the death of his parents.

### Registered Disability Savings Plan

The Registered Disability Savings Plan ("RDSP") was introduced in December 2008. The RDSP allows for a combination of individual, family and government financial assistance contributions to assist people with disabilities to grow, manage and control a financial asset.

To open an RDSP, one must qualify for the Federal Disability Tax Credit

(DTC). If a child or grandchild qualifies for the DTC the parent, grandparents or other legal representative may establish and contribute to an RDSP up to a lifetime maximum of \$200,000. The DTC-eligible person shall be the sole beneficiary of the RDSP.

As a result of opening an RDSP, annual contributions will attract:

- Canada Disability Savings Grants (CDSGs) at a matching rate of 100, 200 or 300 percent depending on the family income and the amount contributed up to a maximum lifetime CDSG limit of \$70,000; and
- Canada Disability Savings Bonds (CDSBs) of up to \$1,000 per year for low and modest-income families for a lifetime maximum of \$20,000.

The most obvious thorn in establishing an RDSP is the matter of capital contributions (which are not deductible) as not everyone is in a position to fund such a plan. One strategy is to insert a clause in the parents' Wills instructing the Estate Trustee to fund the RDSP with the disabled child's share.

The RDSP, like the Henson Trust, is an exempt asset for ODSP purposes and therefore the benefits of the disabled child contained therein will

not be compromised.

The 2011 Federal Budget addressed the difficulty of funding an RDSP by creating a new funding option permitting conditional rollovers of RRSPs into RDSPs. Indeed, as of July 1, 2011, for deaths occurring after March 3, 2010, one may now roll the deceased parent's RRSP proceeds into the RDSP of the disabled child on a tax-free basis. This new rule extends to amounts transferred to an RDSP from the proceeds of a Registered Retirement Income Fund (RRIF) and certain lump-sum amounts paid from Registered Pension Plans (RPP).

### Ideal Estate Planning for the Smiths

The Smiths now have two valuable options available to them where they can provide for Ryan with the assurance that his ODSP benefits will not be jeopardized. Their Wills could provide that their RRSPs (or a portion of them) be rolled into an RDSP on a tax-free basis. If there is still "room" in the RDSP (that is if the RRSPs have not reached \$200,000.00), then their Wills may also provide for a portion of Ryan's share in the Estate to be paid into the RDSP up to the threshold value. The remainder of Ryan's share in the Estate shall be transferred into a Henson Trust for his benefit. Corey would be the Trustee of the Henson Trust and would administer the trust for Ryan's benefit.

If the Smiths each maintained a



modest life insurance policy (of \$50,000 for example), they could name both of their children as alternate beneficiaries (the surviving spouse would be the first named beneficiary). If that is the case, Ryan and Cory would both receive \$50,000. In such instance, a life insurance trust could be created in which he would deposit the life insurance proceeds. Such a life insurance trust has a threshold of \$100,000.

The proceeding examples explain how the Smiths are able to provide for Ryan without compromising his ODSP

benefits through careful estate planning.

### Cautions

There are drawbacks to both a Henson Trust and RDSP that ought to be considered. We recommend you consult with a professional so that those drawbacks be clearly highlighted and discussed. Ultimately, the estate planning must be tailored to the circumstances and the parents must decide what is feasible given their intentions and their means and the size of their family.

### Conclusion

From the foregoing one can appreciate the tremendous advantage of Ontario parents having effective Wills in place is underscored when their child is disabled. The impact on that child's future may be profoundly affected for the better.

If you have any questions, please do not hesitate to contact me directly 613.288.3220 or by email at [sdesmarais@tslawyers.ca](mailto:sdesmarais@tslawyers.ca)

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## Sébastien Desmarais

LL.B., LL.L., J.D.

613-288-3220

E-mail: [sdesmarais@tslawyers.ca](mailto:sdesmarais@tslawyers.ca)

Blog: <http://ottawalawyers.wordpress.com/>

### CALL TO THE BAR

Law Society of Upper Canada, 2007

### EDUCATIONAL BACKGROUND

- University of Ottawa, LL.L., 2007
- University of Ottawa, LL.B., 2005
- Michigan State University, College of Law, J.D., 2005

### PRACTICE SUMMARY:

Sébastien joined Tierney Stauffer LLP as an Associate in the Wills, Estates & Trusts Planning & Administrative Practice Group in 2009. His practise focuses on estate planning, will drafting and personal and corporate taxation. Sébastien has experience in resolving disputes with the Canada Revenue Agency (CRA), filing voluntary disclosures, assisting individuals with their tax related issues and tax planning for families and businesses. Sébastien is bilingual and practices in both official languages.

He has spoken at various seminars on estate, trust and tax matters. Sébastien has also appeared on radio and television discussing legal issues. He is a tutor for the Law Society of Upper Canada for the Estate Practice section.

Prior to joining Tierney Stauffer LLP, Sébastien practiced with another Ottawa law firm where he gained experience in tax law, charity law, estate planning and will drafting.

