PLANNING FOR SPECIAL NEEDS BENEFICIARIES

Most parents understand that a large estate is usually necessary to provide sufficient funds for full, lifetime care of a person with a disability. As such, estate planning for the family will often include seeking ways to maximize and protect government assistance, while at the same time ensuring that the wills provide adequate and proper support over the child's lifetime.

Ontario Disability Support Benefits are available on the basis of need for adults with disabilities. In order to qualify for such benefits, the person cannot exceed the asset limit set out in the legislation, and can receive only modest amounts of income, either directly, or indirectly from a trust, for things or services that are not directly disability-related. If an adult beneficiary with a disability inherits assets directly, he or she will likely be disqualified from receiving government benefits and will have to exhaust most of the inheritance before requalifying. Since the disabled beneficiaries are usually the beneficiaries with the greatest needs, the parents usually plan their financial affairs to arrange for the care of such a child, taking into account both private means and government benefits.

The following are important considerations:

(1) the need of the beneficiary with a disability for money beyond what would be provided by the Ontario Disability Support Plan;
(2) the size of the estate;
(3) the needs of the other beneficiaries;
(4) the possibility that the beneficiary will not qualify for government support in the future because he or she becomes employed or legislation changes.

If the parents make the decision that their child with a disability should continue to qualify for government benefits, they will have to decide whether to create a trust for the child in their wills.

A *"trust"* is a right of property held by one person for the benefit of another. The *"settlor"* or *"testator"* is the person who creates the trust, either during lifetime, or by his or her will. The *"beneficiary"* is the one for whose benefit the trust is created. The *"trustee"* is the person who holds legal title to the property in trust for the benefit of another person and is given powers and duties to carry out the trust.

People who receive government benefits as the result of a disability may continue to qualify for benefits in spite of the fact that they have an interest in certain trusts.

An Absolute Discretionary Trust (a "Henson" Trust)

An absolute discretionary trust is a trust by which the trustees have complete discretion to decide to pay income and capital to or for the benefit of a beneficiary, or to decide not to make such payments, from time to time, solely in the trustees' discretion, subject to rules of trust law.

This means that the beneficiary cannot compel the trustees to make payments and, therefore, the beneficiary does not have a "liquid asset", which would disentitle him or her to government benefits.

One should note that since the trustees cannot be compelled to make payments, there is no guarantee that payments would be made to or for the benefit of the beneficiary. Therefore, it is of the utmost importance for the parents to review the nature and purpose of the trust, and to consider very carefully the appointment of the trustees who will be making the discretionary decisions.

$100,000 Disability Expenses Trust

Parents may also consider a second kind of trust permitted by the *Ontario Disability Support Program Act, 1997*, often referred to as the "$100,000 Disability Expenses Trust". Such a trust will not disentitle the beneficiary to government assistance to the extent that payments from the trust, including both income and capital, are used only for disability-related items or approved services, education, and training related to the disability, the costs of administering the trust, and other payments not exceeding $4,000 per annum.

Parents may consider that such a trust offers more protection to the disabled beneficiary because the income must be paid out of the trust.

It is also possible for a beneficiary who inherits directly to cause such a trust to be settled with the direct inheritance. "Inheritance" includes money left pursuant to a will or outside a will such as under a life insurance policy, proceeds of an RRSP or an RRIF, and money received on an intestacy.