

TAB 2

The Disabled Dilemma: Estate Planning for Disabled Adults

Peter B. Lillico
Lillico Bazuk Kent Galloway

13th Annual Estates and Trusts Summit
Day One - November 17, 2010



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Continuing Professional Development

THE DISABLED DILEMMA:

Estate Planning for Disabled Adults

Peter Lillico
Lillico Bazuk Kent Galloway

I THE DISABLED DILEMMA

Many families include an adult disabled child or sibling. Sometimes the nature of the disability is physical, other times it is a mental limitation. Whatever the type of disability, parents routinely are the child's primary safety net. During their lifetimes parents provide physical, emotional and financial support so critical to the disabled child's well being. Often the child lives with the parents, who are best positioned to address the special needs. Typically the parents also assist the child monetarily.

The dilemma for parents is: How can we make provision for our disabled child when we are no longer alive? The usual manner for a parent to provide for children following death is to leave them an inheritance by way of a Will. Giving a mentally disabled child a direct bequest is inherently risky since the child's disability may mean he or she is not capable of responsibly managing his or her affairs, and may also leave him or her vulnerable to exploitation by others.

II ONTARIO DISABILITY SUPPORT PROGRAM

Prudent estate planning for disabled adults must include an understanding of the role government plays in their lives. The primary government support program for disabled adults in financial need is the Ontario Disability Support Program¹ (ODSP). According to recent statistics there are over 380,000 adults in Ontario who qualify for the ODSP and the numbers are increasing rapidly, by more than 12% in the last two years.²

The benefits to a disabled person of the ODSP are substantial and extensive. They include monthly income support, employment support, vision care, dental coverage, prescription drug coverage, assistive devices, medical supplies and more. This package of financial and health related supports is usually the foundation upon which the disabled adult's life is based, and its retention will usually be a prime goal of the estate planning for him or her.

Not surprisingly there are limitations on the ODSP benefits. One is that if the recipient acquires more than \$5000 in non-exempt assets³, he or she will become disqualified from the program. Another is that if the recipient receives more than \$6000 annually in non-disability related income, the income support will be reduced proportionately.

¹ The ODSP website www.mcass.gov.on.ca/en/mcass/programs/social/odsp/ is a valuable resource for details of the program.

² Ministry of Community and Social Services, Social Policy and Development Division, Policy Research and Analysis Branch, Statistics and Analysis Unit, August 2010

³ Examples of exempt assets include necessary furnishings and clothing, an owner occupied home, personal motor vehicle, prepaid funeral, Registered Educational and Disability Savings Plans. Money in the bank, investments and many other assets are non-exempt.

In addition to the previously mentioned risk of a disabled adult child's ability to cope with an inheritance, a critical planning issue is the risk that an inheritance will disqualify the child from the ODSP benefits he or she has been receiving. Since this program typically represents the primary financial support, as well as paying for what are often very expensive medications and provides other important benefits, a disqualification can be a tragedy indeed.

III ESTATE PLANNING TECHNIQUES

The challenge then for estate planners is to ensure that provision made for an ODSP recipient does not result in disqualifying him or her from those very necessary benefits. If your client's intended beneficiaries include someone who is an ODSP recipient, or someone who may become an ODSP recipient in the future, then a working knowledge of how best to deliver the security and advantages of an inheritance while avoiding the loss or reduction of the ODSP benefits is essential to proper planning.

There are a variety of alternatives that are employed to this end, but not all are equally effective.

A Disinheritance

Some testators, aware of the potential problems arising from an inheritance for a disabled family member and loathe to risk the loss of their ODSP benefits, sidestep the issue by disinheriting that child entirely. Sometimes the testator will leave a larger inheritance to another child in the expectation that the non-disabled child will then use the largesse to benefit the disabled child informally.

This technique is not recommended for a variety of reasons. The first is lack of certainty of result. Family relationships are complex, and not invariably positive. There is no guarantee that the inheriting child will apply the inherited funds in the manner expected by the now deceased testator, defeating the intention.

A second is lack of tax effectiveness. Even if the inheriting child does honourably invest the extra money and use the income (and/or capital) to assist the ODSP recipient, the income generated from the investment will be taxed in the hands of the inheriting child. This may increase his or her marginal rate of taxation, or result in a partial claw back of Old Age Security. In any event the income is unlikely to be taxed at the low marginal rate that an ODSP recipient "enjoys", and so relative tax inefficiency results.

A third is lack of security. Should the inheriting child have the misfortune to subsequently become separated from his or her spouse, it is possible that the divorcing in-law's lawyer will take the position that these moneys are part of the net family property and should be equalized between the spouses. Certainly any creditor or trustee in bankruptcy of an inheriting child can be expected to dismiss the plea that "Some of my money is really my sibling's inheritance, although there's nothing whatsoever in Mom's Will or in the manner of ownership to substantiate that."

A fourth is lack of succession protection. Most married children's Wills simply leave everything to his or her surviving spouse. Unless that Will contains express provisions to the contrary, the inheritance value intended for the ODSP recipient sibling will pass on to the

surviving spouse. He or she may not be aware of the intended purpose for these funds, or may not feel obligated to honour it.

We could go on further down this path of potential perils, but there's no need. There are several far more effective ways in which to address the disabled dilemma than the flawed and drastic disinheritance approach.

B Direct Inheritance

If the testator's intended bequest is less than \$6000, then this can be left directly to the ODSP beneficiary without resulting in disqualification from benefits. The timing of the receipt of the inheritance is significant however, since too much at once may tip him or her over the limit of non-exempt assets. Usually this is managed by the careful estate trustee paying the bequest in more than one instalment, if a single payout would exceed the recipient's limit.

More valuable assets can be bequeathed directly, including a home to be occupied by, or a motor vehicle for the personal use of, the ODSP recipient. Such inheritances are treated as exempt assets, but there remains an inherent risk. Perhaps it is not safe or appropriate or desirable for the ODSP recipient to remain in the house. Subsequent to the inheritance he or she may want to sell it and live more appropriately elsewhere. Although the bequeathed asset may be exempt in its inherited form, should an exempt home or car be subsequently sold by the ODSP recipient the proceeds of sale will not be exempt and loss of income support or outright disqualification can result. (Note that a sale of a home and the application of the sale proceeds to the purchase of another residence will avoid this. If however there is a surplus of proceeds, say in downsizing from the detached family home inherited to a more sustainable but less expensive condominium, then the same risk arises.)

C Trusts Derived From Inheritance

Perhaps grandmother made a bequest in her Will of \$25,000 to "each grandchild who shall be living at the date of my death." What happens when the estate trustee learns that one of the grandchildren on the ODSP?

One approach would be for the estate trustee to parcel the bequest out in stages, ensuring that each interim distribution does not result in the ODSP recipient exceeding the limit for non-exempt assets. This could result in many small distributions, and extend the estate administration process unduly.

A more elegant approach is to make use of a type of trust referred to by the ODSP as a Trust Derived From Inheritance. This type of trust could be expressly provided for in the Will of the testator, but if there is an opportunity for the practitioner to be involved at the Will planning stage then it is far more effective to use the "Henson" type trust referred to below. Usually a Trust Derived From Inheritance is created after the fact of inheritance becomes known by the estate solicitor (or the lawyer acting for the ODSP recipient) to deal with a bequest or share of the residue that would result in an inheritance entitlement over the limit for exempt assets.

This type of trust will have a third party (ie not the ODSP recipient) as trustee, and the terms of the trust will provide that distributions can be made from the trust, typically on a discretionary basis, for the support and maintenance of the ODSP recipient. The prudent practitioner will also provide for a replacement trustee should the initial trustee become

unable or unwilling to act, as well as a contingent beneficiary should the ODSP beneficiary die prior to the distribution of all of the trust assets.

Be warned however that there is a strict limit of \$100,000 on the capital of a Trust Derived From Inheritance if it is to be treated as an exempt asset. Even if the original inheritance was less than the limit of \$100,000, should interest or other income derived from the initial invested asset result in the capital increasing beyond the \$100,000 limit, the Trust Derived From Inheritance will no longer be treated as an exempt asset. Predictable and unfortunate consequences will flow.

Also note that the receipt of insurance proceeds by an ODSP recipient can also be diverted away into this type of trust, again subject to the cap of \$100,000 to maintain its status as an exempt asset.

Whether the funding is from inheritance or insurance, this type of trust must be created and settled within six months from the date of the receipt of an inheritance or proceeds of insurance to comply with ODSP guidelines and qualify as an exempt asset.

It is perhaps relevant to relate that even the ODSP administrators are not necessarily aware of the availability of a Trust Derived From Inheritance. Following a seminar on the topic of estate planning for special needs children sponsored by a local Association for Community Living, I was challenged by the mother of an ODSP recipient who had recently been cut off her ODSP benefits when she received some \$40,000 following the death of her ex-husband. I assured her that my information was correct, and encouraged her to bring this to the attention of the ODSP administrator in her area. Apparently this fell upon deaf ears (no disabled pun intended) and it took a threatening letter enclosing a copy of the ODSP's own Income Support Directive 4.7⁴ before appropriate remedial action was taken. To its credit, once the error was acknowledged the lady's daughter was immediately reinstated, and her denied income support reimbursed in full with interest.

Once the Trust Derived From Inheritance has been settled, then the beneficiary ODSP recipient will be able to benefit from increased income and security as outlined below in section E.

D Absolute Discretionary (Henson) Trust

Unquestionably the most flexible and protective approach to addressing the disabled dilemma is by use of an absolute discretionary trust, often referred to for historical reasons as a "Henson"⁵ trust.

A Henson trust is actually a form of absolute discretionary trust. For our purposes, the trust will name a trustee (other than the ODSP recipient of course), and settle the inheritance upon the trustee. The trustee will typically, but not necessarily, be precluded from distributing trust capital or income to anyone other than the ODSP beneficiary during his or her lifetime. The

⁴ This Income Support Directive is appended as Appendix A to this paper. It, and other helpful ISDs, are available online through the Ministry website referred to above.

⁵ Leonard Henson was the father of a disabled daughter, Audrey. Audrey was a recipient of Family Benefits Act support, the predecessor to today's ODSP. He arranged to leave her an inheritance in the form of an absolute discretionary testamentary trust. The Ministry of Community and Social Services challenged the exempt status of Audrey's trust inheritance in court. It lost at trial, and again on appeal. As a result this valuable technique continues to be referred to as a "Henson" trust, and is no longer challenged by the Ministry.

trustee is not required to distribute capital or income however, but such distributions are in the absolute discretion of the trustee. Since the ODSP recipient beneficiary has no legal entitlement to a distribution, the trust assets are not his or her assets within the meaning of the ODSP.

As a practical matter, the trustee will distribute capital and income to the ODSP recipient at such times and in such amounts as will provide the maximum benefit to the disabled beneficiary, without crossing the line and running afoul of ODSP qualification and income requirements (summarized in section E below).

The wording of a Henson trust is critical to its acceptance by the ODSP and the success of its intended purpose. A sample clause is appended to this paper as Appendix B. The usual disclaimers apply of course.

One of the principal advantages of a testamentary Henson trust is that, unlike the Trust Derived From Inheritance, the capital and growth of the trust funds can exceed \$100,000 without giving rise to consequences for the ODSP recipient. When the testator is bequeathing the residue or a share thereof to an ODSP recipient beneficiary, and the quantum of the eventual inheritance is of course not known at time of drafting, the use of the Henson trust will obviate problems.

The use of a Henson trust is not restricted to testamentary bequests. They can also be creatively used as inter vivos trusts. Perhaps a parent is providing ongoing financial support to his or her ODSP recipient child by gifts of \$400 per month. This will total less than the maximum \$6000 per year of other income permitted by the ODSP, and so will not result in any reduction of income support. However, if the generous parent is in the top tax bracket, then he or she must dedicate the income from investments producing about \$9000 in order to have the \$4800 left after tax to gift to the child. It may be more attractive to either loan to or settle upon an inter vivos Henson trust a much lesser amount of capital to invest, sufficient to produce only the \$4800 intended to go to the ODSP recipient child. That income then will be taxed in the hands of the ODSP recipient, certainly at low marginal rates and possibly without any taxation.

Like the beneficiary of the Trust Derived From Inheritance, the beneficiary of a Henson trust, testamentary or inter vivos, realizes many important advantages. The principal ones are listed in the following section E.

E Planning Advantages of Trusts

When the ODSP recipient's inheritance is safely settled upon a Henson trust, or Trust Derived From Inheritance, then the results can be very advantageous from the planning perspective:

1. No disqualification, reduction or interruption in the receipt of ODSP benefits.
2. Unlimited amounts can be distributed from the trust income and capital for disability related⁶ expenses of the ODSP recipient. Purchasing a motorized wheelchair, or

⁶ "Disability related expenses" include expenditures for assistive devices such as a mobility scooter or motorized wheel chair; health care; safety items, such as prosthetics or life-alert systems; disability-related support services, such as attendant care or specialized equipment; renovations or alterations to the residence to improve accessibility or maintain health and safety standards; education and training costs related to a disability.

paying for the services of a support worker, can make a huge difference in the quality of life for a disabled person.

3. Up to \$6000 can be paid annually for non-disability related expenses of the ODSP recipient from the trust income and capital without any adverse consequences to the income support entitlement. Non-disability related expenses include additional money for renting a nicer apartment, or for more food, or for warmer clothing.
4. The trust funds remain available for the beneficiary as a safety net if the ODSP benefits cease in the future, perhaps because the program ends or because his or her eligibility is redefined.
5. If the beneficiary has creditors, or goes bankrupt, or (subject to the greater expertise of our family law colleagues) becomes separated, the trust income and capital are protected from such hostile claimants.
6. When the beneficiary turns 65, the ODSP income support ceases and federal support can become available. Then the ODSP related limitations on income and capital from the trust no longer apply. The trust money is now available for the benefit of the ageing beneficiary without those external restrictions.
7. If a beneficiary recovers from the disability and no longer needs the ODSP, then the trustee in his or her absolute discretion may choose to terminate the trust and distribute all of the remaining trust fund to the beneficiary. This is a rare but happy event, and has occurred at least twice in my practice.
8. If the beneficiary's needs during his or her lifetime do not require the expenditure of all of the trust assets, then after his or her death the remaining money can be directed by the provisions of the trust to his or her issue, or to other family members, or to charitable organizations.

III PRACTICE CONSIDERATIONS

A Trustee Choices

When developing a Trust Derived From Inheritance, or a Henson type trust, a crucial decision is always the choice of trustee. In assisting the client in choosing a trustee, remember always that the ODSP recipient cannot be the trustee of his or her own trust and stay "onside" with the Ministry.

Frequently the testator or settlor will consider a sibling of the ODSP recipient to act as trustee. This is appropriate from a legal perspective, but the impact upon family dynamics should also be weighed. Will the sibling feel aggrieved and burdened by the obligations of trusteeship, with an adverse effect on fulfilling that role? Will the beneficiary feel resentful that the sibling is in control of "his" money, or annoyed that in order to retain ODSP benefits some wishes and desires must be rejected? Will the trusteeship relationship ruin an otherwise amicable sibling relationship?

Another approach could be to name a corporate trustee. The advantages include professional investment of the trust funds, and an objective and expert operation of the trust itself. Other family members are relieved of these responsibilities, and free to simply be supportive of the ODSP recipient relation. The disadvantages are that the corporate trustee will naturally charge a fee for its services; may not have the same perspective as a family member as to the

expenditures; and each trust company will have a minimum trust capital requirement before accepting the role.

If individuals, whether family members or otherwise, are the preferred trustee approach, then consideration should be given to a co-trustee appointment. Two heads are sometimes better than one, and certainly this will permit the sharing of the duties and responsibilities rather than resting solely on one set of shoulders. Dispute resolution clauses such as “majority rules” or arbitration should be incorporated into the trust document if multiple trustees are appointed.

One approach I have successfully employed at times is to appoint a family member as the primary trustee, and a trust company as the substitutionary trustee should the family member become unable or unwilling to act. This structure permits a family member who finds the going too arduous an honourable way out. It can also prevent problems too. A beneficiary who becomes stropky about the family member trustee’s decisions may then be presented with the option of the family member stepping aside in favour of the corporate trustee, since his or her efforts are esteemed so poorly. Many a beneficiary given such a choice has effected an immediate and positive attitude adjustment, realizing that the lesser of the evils may well be the known sibling and not the unknown and impersonal trust officer!

B Funding Issues

If a Henson trust is chosen to be the preferred method of providing for an ODSP recipient child, consider how it is to be funded. Although an unlimited amount may be settled upon this trust without ODSP consequences, only a limited amount of non-disability related income can be distributed annually without ODSP consequences.

A wealthy client who intends to allocate a million dollars to a Henson trust should be reminded that only \$6000 in non-disability related expenses can be paid out annually. If the trust funds will produce considerably more each year than can be expended to benefit the child, then the capital will continue to grow. However, since the growth in capital does not result in any increased opportunity to benefit the recipient (or other family members during the lifetime of the recipient), this may be a very inefficient inheritance technique. If there is a large inheritance potential, then the expert planner may analyze the benefits of foregoing the ODSP benefit loss and permitting the disabled beneficiary full access, whether directly or through a trustee, to the full potential income of the inheritance.

A client of lesser resources with more than one child may wish to allocate a disproportionate amount of the estate to the provision for the disabled child. They reason that although all children are loved, the disabled child’s needs will be greater and his or her ability to support him or herself will be less compared to the siblings. This reasoning may be sound, but it ignores the realities of family dynamics. Consider the reaction of the non-disabled brother who learns not only that most of the parents’ assets are going to the disabled brother, but that in addition he has been saddled with the thankless task of administering it for the benefit of the brother for rest of his life. Some may react positively, others negatively. Good counsel is to endeavour to avoid this potentially contentious situation by a more nearly equal division of estate assets, if this can be effected while retaining the integrity of the support model for the disabled child.

Parents of very limited resources whose prime concern is to ensure that there will be at least some financial safety net for their disabled child after their passing may decide that a joint and

last survivor policy of life insurance will suit the purpose. If started early, small monthly payments may be affordable. With a known amount of policy proceeds available upon death, a specific bequest in that amount subject in a Henson trust can be incorporated into the Will. If there are any other assets available upon the death of the parents, then these can be shared by other children if desired. The main comfort for the parents however is, even if their other assets upon death are mostly exhausted, there is the reassuring certainty that priority provision has been made for the disabled child.

C Distribution Planning

When the trustee receives the inheritance of an ODSP recipient, he or she is positioned to provide support to the beneficiary without affecting the ODSP benefits. A tricky question is, how can this best be effected? The answer to this will always be dependent upon the individual fact situation, relative age of the beneficiary, his or her needs, and the availability of other sources of support.

If the beneficiary child is 50, and the amount of the inheritance is \$50,000, then paying out the maximum annual \$6000 non-disability related amount will result in the trust fund being exhausted in less than 10 years. While the beneficiary may enjoy the ride while it lasts, the abrupt cessation of the enhanced lifestyle the supplementary income made possible will be a punitive adjustment late in life. A better approach might be to pay a lesser amount each year and maintain that level of support until perhaps age 65 when Old Age Security becomes available.

Remember when approaching this stage of the planning that flexibility remains an option. A scheme of distribution that is initially considered appropriate can be amended later if the circumstances change, provided that the initial plan has not unduly reduced the available capital and income.

There is no single correct approach to distributing the trust income and capital, but the trustee is well advised to consider a range of options before settling upon a distribution scheme. There is opportunity for creativity in the planning, and the services of a professional financial planner may also be valuable in addressing this issue.

D Reporting Requirements

The trustee of a trust for a disabled person, whether of the Henson type or Trust Derived From Inheritance, is required by the ODSP to report annually on the trust activity. The details of the reporting requirement are set out in Income Support Directive 4.7, attached to this paper as Appendix B.

In addition to the ODSP reporting requirement, there is also the requirement to report the trust income on a T3 to Canada Revenue Agency.

I also consider it to be good practice for the ODSP to be notified in writing:

- of the existence of the trust
- providing a copy of the trust document
- establishing that it is an exempt asset
- sharing contact information for the trustee
- advising that the trustee knows the relevant ODSP rules for distributions from the trust
- confirming that the trustee is aware of the annual reporting requirement.

Strictly speaking this is not mandatory, but it is mandatory that the ODSP recipient report income received. If the fact of income provided by the trust is not communicated in a timely fashion and the ODSP administration discovers this by a routine review of banking statements, then unnecessary interruptions in income support can result until the information is provided and processed. Providing the advance notice in this manner as recommended will avoid the potential for such problems. This letter may be sent by the lawyer, or by the trustee. A sample of this initial letter from the lawyer is appended as Appendix C.

E Final Tips

1. When taking Will instructions, it is a good practice to routinely ask your testator if any of the intended beneficiaries or their issue is, or might become, an ODSP recipient. This significant information might not otherwise be mentioned, and the opportunity to make appropriate provision in the Will to protect the disabled beneficiary thereby lost.
2. If drafting a Henson trust or a Trust Derived From Inheritance, the prudent practitioner will provide for a contingent beneficiary. This will name another beneficiary if the disabled child dies prior to receiving all of the trust assets during his or her lifetime. When providing for a contingent beneficiary, it is recommended that the trust terms also expressly relieve from the application of the even hand rule. This is appropriate in these types of trusts because the essential purpose is to benefit the disabled primary beneficiary. Most or all of the trust assets may be required to do so, leaving little or nothing for the contingent beneficiaries. Relieving against the even hand rule then will protect the trustee from being challenged for doing the job well and properly, but to the financial detriment of the contingent beneficiary.
3. The trustees of the trusts have a responsible role to play, and usually have not acted as trustees in the past. To assist them in doing their jobs correctly, and reducing the risks of inadvertent non-compliance, I provide them with a handout in my report that, inter alia, summarizes the steps required of them to open a trust account, advises them as to record keeping, and reminds them of reporting requirements. A sample of this is appended as Appendix D.
4. Remember that the beneficiary should annually receive a form of accounting and provide a Release to the trustee. If the beneficiary is capable, then he or she can sign the Release personally. If the beneficiary is not capable but has an Attorney for Property or Guardian of Property then that person can sign the Release, provided of course that the Attorney or Guardian is not one and the same as the trustee. If necessary, a Passing of Accounts should be conducted perhaps every second year to obtain Court approval for the trustee's accounts.
5. The estate planning techniques discussed in this presentation are not exhaustive. There are other valid and valuable approaches to estate planning for disabled persons, such as the creative use of Registered Disability Savings Plans – but that is a topic for another day.

APPENDIX A

Sample Henson Trust Clause

I declare that the capital of such share and the income therefrom shall not vest in the Primary Beneficiary, and the only interest the Primary Beneficiary shall have therein shall be the payments actually made to him or her or for his or her benefit therefrom.

Without in any way binding the discretion of my Special Trustee, I further declare that it is my wish that in exercising the discretion in accordance with the provisions of this paragraph, my Special Trustee shall use such amounts of capital and income from such share as is considered advisable to provide comforts and amenities for the Primary Beneficiary, and that my Special Trustee take account of and, in so far as it may be considered advisable, take such steps as will maximize the benefits which the Primary Beneficiary would receive from other sources, including governmental sources, if payments from the income and capital of such share of my estate were not paid to him or her, or if such payments were limited as to amount or time.

In order to maximize such benefits, I specifically authorize my Special Trustee to make payments varying in amount and at such time or times as my Special Trustee in the exercise of an absolute discretion consider advisable keeping in mind that the comfort and welfare of the Primary Beneficiary is my first consideration.

APPENDIX B

Income Support Directive 4.7 - Funds Held in Trust

Summary of Policy

Funds held in one or more trusts, where the capital of the trust is derived from an inheritance or the proceeds of a life insurance policy and available for maintenance are exempt as assets up to a maximum amount.

The total combined amount of a trust plus the cash surrender value of any life insurance policies owned by a member of the benefit unit must not exceed \$100,000.

Payments from a trust used for approved disability related items or services or education or training expenses incurred because of a disability are exempt as income.

Payments from a trust up to a maximum of \$6,000 for any twelve month period are exempt as income.

Interest earned on a trust is exempt as income provided that it is:

- reinvested into the capital of the trust and the value of the trust does not exceed the maximum permitted,
- used for approved disability related items or services or education or training expenses incurred because of a disability.

Income generated by the trust which is not exempt and paid other than monthly is averaged over a twelve month period.

The income exemptions apply provided that an annual report documenting all income and expense transactions relating to the trust is filed.

No person is eligible for income support unless the person and any dependants provide the information and verification of information required to determine eligibility.

Legislative Authority

Section 5 of the ODSP Act

Sections 28(1)19 and 20; 28(3); 43(1)9 ,10 and 13; 43(4),(5) and (6) of the ODSP Regulation

Summary of Directive

The income and asset treatment of a variety of trust funds and the treatment of payments from such trusts is explained.

Intent of Policy

To allow applicants, recipients and members of a benefit unit to retain inheritances and the proceeds of a life insurance policy by placing such funds in trust up to \$100,000. The total combined amount of a trust and the cash surrender value of any life insurance policies owned by a member of the benefit unit must not exceed \$100,000.

Application of Policy

Applicants and recipients must be informed of the ODSP asset exemption policy for inheritances in trust, and how the income from such trusts is treated. There are a variety of trusts and the impact on ODSP will depend on the terms of the trust.

ODSP staff will need to review each trust to determine the impact of the trust on ODSP, the amount and whether the funds are available to the person for his/her maintenance. ODSP staff should consult with Legal Services Branch when an interpretation of the trust or will is needed whether a trust is derived from an inheritance or life insurance policy, and whether the funds held in trust can be accessed.

Funds from an inheritance or proceeds from a life insurance policy received directly by a recipient and subsequently placed in trust (not a discretionary trust) are treated as income in the month received and exempt as assets thereafter, provided that the trust is established as soon as possible. To allow a reasonable period of time to put the money in trust, recipients may be given up to six months to establish the trust.

An inheritance that is used to purchase a house rather than being placed in trust is exempt because a house is an exempt asset. If the house is later sold, the recipient may place the proceeds from the sale of the house that are traceable to the inheritance into trust, so long as the trust combined with other trusts and the cash surrender value of insurance policies does not exceed \$100,000. For example, if \$80,000 was inherited and all used to purchase a house that was later sold for \$90,000, \$80,000 could be placed in trust and be exempt from consideration as an asset.

A trust may also be established by provisions in a will. Funds placed in trust as a provision of a will are not considered income in the month received. In these cases, a copy of the will must be reviewed to determine whether the funds are available to the person for his/her maintenance. ODSP staff should consult with Legal Services Branch regarding the impact of the trust on eligibility for ODSP. Some trusts established by the terms of a will are only available to the recipient at the discretion of the trustee. These absolute discretionary trusts have no asset limit.

Where there is more than one beneficiary of a trust, the total value of the trust will be divided equally between the beneficiaries unless the wording of the trust specifies a different arrangement.

There are 5 main types of trusts that may be encountered:

1. Trust Derived from Inheritance or Life Insurance and Available for Maintenance

This type of trust may be established by a member of a benefit unit with money received from an inheritance or from the proceeds of a life insurance policy. Also, such a trust may be set up by the terms of a will. The terms that create this type of trust provide that the funds held in trust are available to the person for his/her maintenance or support. Legal Services should be consulted in interpreting the terms of the trust or will.

This type of trust is exempt as an asset subject to the \$100,000 limit. The \$100,000 limit applies to the capital value of the trust derived from an inheritance or life insurance policy, plus the cash surrender value of any life insurance policies held by a member of the benefit unit.

The interest earned on the capital of the trust is exempt as income if the interest is reinvested in the trust and is within the \$100,000 limit.

Payments out of the trust to or for the benefit of a member of the benefit unit may be exempt as income, for example, if used for:

- approved disability related items, services, education or training expenses that are not reimbursable
- any purpose up to \$6,000 maximum in a 12 month period.

Other payments from the trust are treated as income in the month received.

Note: Only funds that are derived from an inheritance or the proceeds of a life insurance policy can benefit from the asset exemption if placed in trust. Funds from different sources would not qualify for this asset exemption.

Reporting Requirements

There should be an annual report from the recipient, or, where there is consent from the member of the benefit unit, from the trustee, that documents and verifies trust activity, including the amount of the capital and any payments in or out of the trust. The information required includes verification of payments made directly to or on behalf of the beneficiary of the trust. As well as information to determine whether an income exemption may be applicable. The authority for requesting information is s. 5 of the ODSP Act and in order for the income exemptions to apply, s. 43(5) of the ODSP Regulation requires that there must be an annual report documenting all income/expense transactions of the trust.

The verification should take the form of independent documents from third parties. For example, trust statements from a financial institution with an explanation of payments out and new payments in. In some cases the trust is a simple bank account in trust. A bank book or yearly statement will suffice as verification since that shows all the withdrawals and deposits.

2. Discretionary/"Henson" Trust

This type of trust gives the trustee absolute and sole discretion regarding payments from the trust to the beneficiary. The trustee is not obligated to make the funds available to the person for his/her maintenance or support.

Please note that just because the terms of the trust give the trustees discretion, this does not mean that it is an absolute discretionary trust. All the terms of the trust and will must be considered to determine the type of trust. Legal Services should be consulted in interpreting the terms of the trust or will.

A true absolute discretionary trust is not considered an asset for ODSP purposes, therefore the capital value of such a trust can be in excess of \$100,000.

Note: Members of the benefit unit who receive an inheritance or are entitled to an inheritance cannot create or put that inheritance in an absolute discretionary trust in an attempt to have the trust not considered an asset. Moreover, members of a benefit unit cannot direct that other types of funds they have received or funds to which they are entitled be placed in an absolute discretionary trust.

Payments from an absolute discretionary trust to or for the benefit of a member of a benefit unit may be exempt as income, for example, if used for:

- approved disability related items, services, education or training expenses that are not reimbursable
- any purpose up to \$6,000 maximum in a 12 month period.

If an income exemption does not apply, then payments from the trust are considered income in the month received.

Reporting Requirements

Although these trusts are not considered assets, information and verification of payments out of the trust, as well as payments into the trust should be reported annually to determine the impact, if any, on income support. The authority for requesting the information is s. 5 of the ODSP Act. Note that a trustee has a duty to report trust finances to the beneficiary of a trust. The form of the verification is the same as described under Trusts Derived from Inheritances above.

A sample letter is provided in Appendix 1 with respect to requesting information and verification where there is a discretionary trust.

3. Private Trust

This type of trust may be derived from an award, settlement or gift and not from an inheritance or proceeds of a life insurance policy. A private trust can be established by a living person for the benefit of another person (often a relative or friend) and is administered by a trustee. Depending on the terms of the trust, funds may or may not be available to the person for his/her maintenance or they may be absolute discretionary trusts that are not part of a will. These trusts are normally considered an asset if the trustee is able to encroach on the capital for the person's maintenance, otherwise they are not an asset. Legal Services should be consulted when interpreting the terms of the trust.

Members of the benefit unit cannot put their own funds or funds to which they are entitled into a private trust if by doing so the funds become unavailable for their own maintenance.

Reporting Requirements

If the private trust is not considered an asset, the reporting requirements are similar to those of absolute discretionary trusts. If the value of the trust along with all other assets is below the allowable asset limit, the trust is an asset and reporting requirements are the same as for an inherited trust.

4. Office of the Children's Lawyer Trust

In some cases, funds awarded by a court are in trust with the Ontario Court (General Division) for minors. Usually, the funds come from an accident settlement rather than an inheritance. Income from a trust fund administered by the Children's Lawyer may be available for the maintenance of the child. An application to release funds can be made through the Office of the Children's Lawyer by a relative, any other person or agency involved with or

acting on behalf of the child. If the application for funds is denied, no further action is required.

5. Public Guardian and Trustee Trust

The Office of the Public Guardian and Trustee (OPGT) administers the assets of some people who are certified mentally incompetent under the Mental Health Act and are residents of psychiatric facilities or outpatients of these facilities. Generally, the assets and income that the OPGT administers on behalf of a member of a benefit unit are accessible to the member and are included as income and assets. However, members for whom the OPGT is trustee could also have separate trusts that are derived from an inheritance, absolute discretionary trust, or private trust. Such trusts would be treated as described above under the relevant heading. An opinion from Legal Services Branch should be sought to confirm the type of trust and its impact.

Treatment of Trust Funds under ODSP

The following charts set out some examples of how the capital, interest generated by a trust and payments from a trust are to be treated. The terms of a trust or will may create a trust that is not described here. The type of trust and its impact should be confirmed with Legal Services.

1. Trust Derived from Inheritance or Life Insurance and Available for Maintenance	
Capital	Exempt as asset up to \$100,000. The combined total of the cash surrender value of the life insurance policy and capital value of the inheritance placed in trust must not exceed \$100,000.
Interest	Exempt as income if reinvested in the trust and the trust does not exceed \$100,000.
Payments (including interest that is paid out)	<p>Exempt as income if used for:</p> <ul style="list-style-type: none"> • approved disability related items, services, education or training expenses that are not reimbursable • any purpose up to \$6,000 maximum in a 12 month period • other amounts withdrawn from the trust are treated as income in the month received. <p>This exemption applies provided the applicant/recipient files an annual report, which is satisfactory to the Director, documenting all income and expense transactions relating to the trust for the year with respect to which the report is filed.</p>

2. Discretionary/"Henson" Trust	
Capital	Not considered an asset regardless of the value.
Interest	Not considered as income if reinvested in the trust regardless of the value.
Payments (including interest that is paid out)	<p>Exempt as income if used for:</p> <ul style="list-style-type: none"> • approved disability related items, services, education or training expenses that are not reimbursable • any purpose up to \$6,000 maximum in a 12 month period per member of the benefit unit. • other amounts withdrawn from the trust are treated as income in the month received. <p>The beneficiary of the trust must provide an annual report accounting for any payments made out of the trust or verifying that no payments were made. Payments into the trust cannot be funds that otherwise belonged to the recipient.</p>

3. Private Trusts	
Capital	Considered an asset if the trustee is able to encroach on the capital for the person's maintenance, otherwise not an asset.
Interest	Not considered income if reinvested in the trust and the trust (together with other assets) does not exceed the allowable asset level.
Payments (including interest that is paid out)	<p>Exempt as income if used for:</p> <ul style="list-style-type: none"> • approved disability related items, services, education or training expenses that are not reimbursable • any purpose up to \$6,000 maximum in a 12 month period per member of the benefit unit. • other amounts withdrawn from the trust are treated as income in the month received. <p>This exemption applies provided the applicant/recipient files an annual report, which is satisfactory to the Director, documenting all income and expense transactions relating to the inherited assets for the year with respect to which the report is filed.</p>

4. Office of the Children's Lawyer Trust	
Capital	Not considered an asset regardless of the value
Interest	Not considered income if reinvested in the trust regardless of the value of the trust.
Payments	If payments are released for the maintenance of the child, the funds are paid quarterly. The monthly average is income unless an exemption applies.

5. The Public Guardian and Trustee Trusts	
Capital	Considered an asset if the trustee is able to encroach on the capital.
Interest	Exempt as income if reinvested in the trust and the capital does not exceed the person's allowable asset level.
Payments (including interest that is paid out)	<p>Exempt as income if used for:</p> <ul style="list-style-type: none"> • approved disability related items, services, education or training expenses that are not reimbursable • any purpose up to \$6,000 maximum in a 12 month period per member of the benefit unit. • other amounts withdrawn from the trust are treated as income in the month received. <p>Note: Inherited trusts administered by the OPGT are treated as outlined in Chart 1. There may also be private trusts or Henson trusts in addition to the funds held by the OPGT.</p>

APPENDIX C

Sample Initial Letter to Ministry

November 8, 2010

Ministry of Community and Social Services
Address

Re: Robert Bruce Ford – ODSP Recipient

Dear sir or madam;

I am the solicitor for the estate of Ambrose Bruce Ford, who died August 27, 2010. I enclose a notarial copy of the last will and testament dated December 12, 2007. Please note that paragraph VIII of that will establishes an absolute discretionary (Henson type) trust for Robert Bruce Ford, a recipient of Ontario Disability Support Program benefits.

Please be advised that the trustees of the trust are:

Norman L. Ford
(Address and phone number)

Garry D. Ford
(Address and phone number)

Please also find enclosed a copy of the Acknowledgement of Trust dated September 27, 2010 executed by the trustees for your records. I confirm that the trustees are aware of the restrictions on distributions from the trust in order for Rob to continue to comply with the provisions of the Ontario Disability Support Program in accordance with Income Support Directive 4.7.

I am advised by the trustees that from the date of death to the date hereof, the sum of \$800 has been distributed to Rob. The trustees propose to distribute the sum of \$400 monthly to Rob to assist in his general support, rather than disability related expenses.

The trustees will provide an annual report to the Ministry disclosing the following:

1. The starting balance of the trust;
2. The income produced by the trust for the year;
3. The distributions for the year to the beneficiary for disability related expenses; and
4. The distributions for the year to the beneficiary for non-disability related expenses.

It is proposed that this report be provided in September of each year, commencing September 2011. Upon request, verification of distributions will be provided.

If there is any matter set out in this letter that is not acceptable to the Ministry, or if any further information or documentation is required to confirm compliance with the ODSP, please contact the writer directly.

Yours truly,

APPENDIX D

TRUSTEE PROCEDURES

For Ontario Disability Support Program Trusts

1. Open a bank account in the name of the Trust (ie, The John Smith Trust, or Jane Doe in trust for John Smith), providing the financial institution with a notarial copy of the Trust Agreement or Will containing the trust provisions. The financial institution will have operation of account and specimen signature forms to be completed.
2. Deposit the inheritance cheque into the bank account, obtaining a written receipt for tax, accounting and other purposes.
3. Preferably with the assistance of a professional investment adviser, decide upon appropriate investments for the trust monies. The type of investment will depend upon the needs of the Beneficiary for income and expense support. A management plan is highly recommended.
4. If the investments chosen are income producing, the Trustee may arrange for the income to be automatically directed from the investment to the trust bank account for eventual distribution.
5. Provide a copy of Trust Agreement or Will containing trust provisions to the Ministry of Community and Social Services, together with an initial letter advising of the existence and status of the Trust, and the Trustee contact information.
6. Pay to the Beneficiary the appropriate amounts from the trust bank account, bearing in mind the ODSP restrictions on annual income and maximum liquid asset levels for the Beneficiary. When in doubt, obtain the advice of a lawyer or the Ministry.
7. Review the investments regularly to ensure that they are continuing to perform as expected, and obtaining such advice as is required to ensure security of the trust capital.
8. Annually provide a report to the Ministry detailing the trust annual starting balance, disability related expenditures, non-disability related expenses and annual end balance.
9. Annually prepare a T3 income tax return for the trust, to be filed with Canada Revenue Agency. The assistance of a professional tax preparer is recommended, but may not be required.
10. Retain accurate accounts of all income and expenditures, receipts and disbursements, in order to be able to prepare the trustee accounts periodically and comply with ODSP reporting requirements if necessary.
11. Have the trustee accounts approved every year or second year. Consult a lawyer to determine who is authorized to approve the accounts and provide a Release.