The Henson Trust

The Henson Trust is one of the best future planning tools for family or friends with a disability; it allows the beneficiary to continue to receive ODSP benefits while also inheriting assets (such as a house, or money) that would normally disqualify him/her from ODSP funding.

Key points on Henson trusts are:

- It is an *absolute discretionary trust* – it gives the trustee full legal power and authority over the assets included within the trust.
- A Henson trust can include a number of different assets (e.g. a house, plus life insurance proceeds to maintain the house, plus lifetime support and care).
- The Henson trust may be created as either an inter-vivos or a testamentary trust. In both cases, it is essential that the term 'absolute discretionary trust' be included in the relevant legal documents so that there is no doubt over what type of trust is being created.
- The most common way a Henson trust is created is through the will of the parent of a person with a disability, but there is no reason it can't be established while the parents are alive (inter-vivos trust).
- However, there may be adverse tax consequences associated with setting up an inter-vivos trust.
- In a Henson trust, it is particularly important that the trustee be a person (or people) who can be fully trusted to have the beneficiary's best interests at heart; the trustee has full control of the trust (meaning the beneficiary's rights with respect to the trust are minimal compared with other types of trusts).

Conclusion

Trusts are a good future planning tool that can enable your loved ones to live in a home of their own, and/or provide financial security. The trustee is the key to any good trust, as they are responsible for the management of the trusts' assets. This is especially true in a Henson trust, where the trustee has full legal authority over the contents of the trust. However, with a reliable trustee, a Henson trust is one of the best and most powerful options available to plan for your loved one's future. If you have any questions about trusts or are thinking about setting one up, you should contact a lawyer or similarly qualified professional.

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A Guide to Housing Trusts:
Providing a Safe and Secure Future for Your Loved Ones

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The Three Certainties

A valid trust *must* meet the following three criteria. It is recommended that you set up a trust with a lawyer or similarly qualified professional, but if you create one yourself make sure these elements are met:

1. Certainty of Intention
   The donor must show that he/she actually meant to create the trust. Therefore, a trust should be created in written form, although it can be created orally as well.

2. Certainty of Subject Matter
   The property that is to form the subject of the trust must be easily identifiable and, and you must know how much each beneficiary of the trust is entitled to receive.
   Ex. You cannot draft a trust agreement that conveys "the little house at the end of the road and enough money to get by for a few months"; you must specify the exact property that you are leaving

3. Certainty of Objects
   The beneficiary (or beneficiaries) of a trust must be easily identifiable.
   Ex. You cannot leave property in trust for "my old friend"; you must specify the person or people you are leaving it to.

Trusts Background

A trust is an arrangement where a person (the **trustee**) holds property for the use or benefit of another (the **beneficiary**). The person who sets up the arrangement between the trustee and the beneficiary is called the **settlor**.

To familiarize yourself with these terms, consider the following example:

John has a disability, and his father Greg wants to ensure that John will have a place to live in the community after he passes away. So Greg (the settlor) sets up a trust naming John's sister Alice as the trustee for a bungalow that John (the beneficiary) will live in.

A house can be included as an asset in a trust. It can make up the whole trust or it can be included along with money and other assets. The trustee is the key to a successful trust; it is the *trust* placed in them that forms the basis of the arrangement. The trustee holds a **fiduciary duty** towards the beneficiary.

Testamentary vs. Inter-vivos Trusts

Testamentary: A trust made through a will.

- Testamentary trusts are subject to rules which regulate wills, and the settlor must ensure that his/her will is valid.

Inter-vivos: A trust enacted while the settlor is still alive (also called a *living trust*).

- Can be revocable or non-revocable. The settlor can expressly state in the trust agreement that he/she reserves the right to change the trustee or revoke the trust.
- A settlor of a living trust can name him/herself as trustee and/or beneficiary.

Pros and Cons of Choosing Trustees outside Immediate Family/Friends

Trust Company:

- Pros: Expertise in managing property and money; sound decision-making related to estates; will not be influenced by family arguments.
- Cons: Fees; many trust companies won't handle smaller trusts; company employees change and the relationship between trustee and beneficiary may not be consistent; the company may less sensitive to the needs of the beneficiary compared with a family member.

Professional Law Corporation:

- Pros: Expertise in managing trusts and trust law; administrative work is taken care of by the corporation; no conflicts of interest between corporation and family members.
- Cons: Fees; corporate trustee may not understand the beneficiary as well as family.

Key Terms and Definitions

Trustee: A person who has legal authority to manage money or property on behalf of someone else.

Beneficiary: A person who is legally entitled to the benefits of property in a trust.

Settlor: A person who creates a trust by transferring his/her property to the trustee (or agrees to transfer the property at a later date).

Fiduciary duty: A person with a fiduciary duty to someone else has a duty to act in the other person's best interests. This duty implies acting with candour and honesty.