# *Your Guide* to Henson Trusts

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## Your Guide to Henson Trusts

While most Canadians are aware that estate planning is important, the benefits of preparing legal documents such as *wills, powers of attorney and trusts is often underestimated for individuals with disabilities and their families.* The methods with which different provincial governments control benefits also highlight the importance of estate planning. Because of this, understanding the issues raised by interaction between government benefits and the laws governing the transfer of property is vitally important to maintaining financial security as well as protecting assets for individuals with disabilities. The following guide discusses the role Henson Trusts can play in planning for the financial well-being of individuals with disabilities.

### What is a Henson Trust?

**A trust is a legal arrangement through which assets are legally held by one individual (a "trustee") for the benefit of another (a "beneficiary").** The person who sets up the trust is referred to as the "settlor" and is usually a relative or friend of the beneficiary (the settlor can also be the beneficiary of the trust).

Trusts can be setup while the settlor is still alive (referred to as an inter-vivos trust), or provided for as a testamentary trust in a will.

**A "Henson" Trust is one type of trust that can be used when planning for your relative with the disability.** These types of trusts give absolute discretion to trustees over making trust payments to beneficiaries.

### The Henson Trust & Income Support Programs for Persons with Disabilities

Henson Trusts are an effective planning tool when making provisions for individuals who receive provincial disability-related income support. As part of the eligibility criteria for many of these programs, individuals cannot own certain assets in excess of specified amounts. For example, the Ontario Disability Support Program (ODSP) allows single individuals up to $5,000 in 'non-exempt assets'.

Non-exempt assets include cash in bank accounts and most types of investments. This means that ODSP recipients who receive inheritances or the proceeds of life insurance policies of more than $5,000 can have their ODSP benefits suspended or terminated until the funds decrease below the allowable limits or are transferred into an 'exempt asset'. Unfortunately, this has the potential to cause considerable expense and uncertainty in lives of the beneficiaries. In order to avoid such disruptions, legal professionals often suggest the use of Henson Trusts when individuals plan to leave an inheritance to a person in receipt of benefits. The use of a Henson Trust ensures that the beneficiary's benefits continue because the trust is considered an 'exempt asset' when determining eligibility for income supports. This means that a person in receipt of ODSP benefits could also be the beneficiary of a trust containing assets of any amount.

Moreover, trustees are able to use funds from a Henson Trust to supplement an individual's income support benefits. In Ontario for example, there is a $6,000 limit on money given to a beneficiary in any consecutive 12-month period for non-disability related goods or services. However, additional amounts are allowed for disability-related items and services identified in ODSP policy directives, such as assistive devices, care-giving services and support. It is important to note that the wording of the Henson Trust must give absolute discretionary spending authority to the trustees and provide that monies are to be used for the benefit and well-being of the beneficiary. Furthermore, families should seek legal advice when considering the use of a Henson Trust as treatment does vary between provinces. At the time of writing, Henson trusts are effective in British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island.

## Henson Trusts & RDSPs

Since the introduction of the Registered Disability Savings Plan (RDSP) in December 2008, many have questioned the continued use and importance of Henson Trusts. The simple answer is that in most cases, having both an RDSP and a Henson Trust in place to supplement other income is advisable.

## Benefits of a Henson Trust

- There are no eligibility criteria associated with qualifying for a Henson Trust, whereas, a person must qualify for the Disability Tax Credit Certificate in order to be eligible for an RDSP.
- There is no maximum amount of assets that can be placed in a Henson Trust, whereas there is a maximum lifetime contribution limit of $200,000 in personal contributions to an RDSP.
- Residual beneficiaries of Henson Trusts can be named, while RDSPs do not allow for this.
- While funds can be paid to beneficiaries of Henson Trusts at anytime, there are a number of rules associated with the timing of payments from RDSPs.

## Benefits of an RDSP

- The RDSP provides generous incentives of up to $90,000 in government contributions over the course of the plan's lifetime. There are no such incentives available with Henson Trusts.
- Income from an RDSP is not subject to rules imposing maximum payments or spending criteria. Many provinces impose restrictive rules on the spending of trust monies.
- There are no fees associated with setting up an RDSP. Legal assistance is highly recommended when setting up Henson Trusts.
- Beneficiaries of RDSPs have the ability to control their own funds, while trustees have absolute spending authority over trust monies.

Individuals should consider the benefits of either opening an RDSP or creating a Henson Trust based on their own set of circumstances. In most cases, the winning strategy will likely involve the use of both tools. The benefits of both tools can be used together to maximize support for beneficiaries.

## Here's how it can work:

1. **With a Henson Trust in place, monies from the trust can be used to fund an RDSP, thereby attracting annual government contributions which can be used for the benefit of the beneficiary at a later point in his or her life.**
2. **When the time comes that money is needed to supplement the beneficiary's income, a number of factors should be considered including:**
   a. Has the Henson Trust taken effect? In other words, has the settlor of the trust passed away or has an inter-vivos trust been created?
   b. How much money is required?
   c. What is the money going to be used for?
   d. Would payments from the RDSP trigger the loss of any government contributions?

The answers to these questions will be the basis for the decision to access income from the beneficiary's RDSP or trust. The following examples illustrate how Henson Trusts and RDSPs can work together to maximize financial support.

## Example 1:

Mary is the beneficiary of an RDSP and a Henson Trust. She's part of the ODSP and requires $2,500 to modify her vehicle for accessibility. Five years have passed since the federal government's last contribution to Mary's RDSP.

## Trust or RDSP?

In this example, it would make sense for Mary's trustees to access $2,500 from her trust in order to pay for the modifications to her vehicle. First, the $2,500 may be considered exempt under ODSP as the money is being used for a disability-related good or service. Second, withdrawing the money from her RDSP would trigger the loss of up to five years' worth of government contributions.

## Example 2:

Jamie is the beneficiary of an RDSP and a Henson Trust. He's also part of the ODSP and receives $500 per month from the trust for everyday living expenses. He requires $1,000 to join his friends on a vacation to Florida. Twelve years have passed since the federal government's last contribution into Jamie's RDSP.

## Trust or RDSP?

In this example, it would make sense for Jamie to access $1,000 from his RDSP for the vacation. First, he receives $6,000 per year from his trust which is the maximum amount he can receive from the trust in any 12-month period for non-disability related goods or services. Second, withdrawing the money from his RDSP would not trigger the loss of any funds as twelve years have passed since he received his last government contribution.


*Contact me for more information.*

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