

Absolute Discretion (Henson) Trusts

Families with a mentally or physically disabled family member face unique estate planning issues. Increased life expectancies make providing for long-term care a major priority. Provincial laws require parents to provide adequately for their dependant-disabled child. If parents choose to exclude a dependant, the courts may vary the distribution under the Will. On the other hand, gifting assets directly to the disabled person may disqualify or impact benefits under government programs.¹

What is an absolute discretion (Henson) trust?

An absolute discretion or Henson trust is designed to protect a disabled person's right to collect government benefits and access programs. It is called a Henson trust, named for the Henson case decided in the Ontario courts in 1989.

Differences from other trusts

Absolute discretion trusts differ from other trusts because the person who establishes the trust merely defines the beneficiary. The trustee is allowed to decide when and how the trust assets are used. This is important because the beneficiary does not have an enforceable entitlement to either the income or the capital of the trust. As such, the trust assets are not considered assets of the disabled person, and will not be taken into account when determining their eligibility for government support programs.



Creating the absolute discretion trust

Proper drafting by an estate and trust lawyer is crucial. To make the trust discretionary, the trustee must be allowed absolute discretion in whether or not to use the income and capital of the fund.

Discretionary trusts normally terminate on the death of the disabled beneficiary. The settlor may wish to include a provision directing the trustee to pay the beneficiary's funeral and testamentary expenses before the final distribution of the trust property.

Responsibilities of the trustee

Along with standard trustee responsibilities to invest, account, report, file tax returns, etc., there is an additional responsibility when acting as trustee for an absolute discretion trust. Each province has different government support program regulations regarding assets held and how much income a disabled beneficiary may receive. As these amounts can change periodically it is the trustee's responsibility to be aware of these limits.

Professional assistance

It is important for families to put in place a well-thought-out plan to assist in caring for a disabled family member. Absolute discretion trusts are complex legal areas; serious consideration should be given to the selection of an appropriate estate and trust lawyer.

¹ Programs vary by province. Absolute discretion trusts may be disallowed under certain programs. Legal advice is required.

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