

ESTATES & TRUSTS LEGALNEWS

PLANNING FOR DISABLED BENEFICIARIES: THE HENSON TRUST

by Kathleen A. Strachan

Background

In drafting his Last Will and Testament, Leonard Henson established an absolute discretionary trust to allow his disabled daughter to benefit from his estate while still preserving her entitlement to government assistance. The Will transferred his estate to three trustees and gave them the absolute discretion to withhold or to spend the income and capital of the trust in whatever way would serve his daughter's best interests. Upon his death, the Ministry of Community and Social Services stopped paying benefits to his disabled daughter. The Social Assistance Review Board, the Ontario Divisional Court and the Court of Appeal all overturned the Ministry's decision and held that the definition of "assets" did not include a person's beneficial interest in a trust in which the trustees have an absolute and unfettered discretion, and in which the person had no right to demand payment of the income or capital of the trust.¹

Assessing options

In determining whether or not a Henson Trust is a suitable planning option for a client, consideration should be made regarding the beneficiary's age, the nature and value of the client's assets, the nature of the beneficiary's disability, and whether the disabled beneficiary wants to continue to receive Ontario Disability Support Program ("ODSP") benefits.

- Age of the beneficiary - ODSP benefits are typically only paid up to age 65, after which time a person will then be in receipt of seniors' benefits. Therefore, if the beneficiary whom the client wants to benefit in his or her Will is nearing age 65, consideration should be made as to whether or not a Henson Trust is a suitable option.
- Nature and value of the estate's assets - if the estate is relatively sizeable and there are few beneficiaries, consideration should be made as to whether the disabled beneficiary would want to discontinue receiving ODSP benefits and instead be fully supported by his or her share of the estate.
- Nature of the beneficiary's disability - a beneficiary may or may not require funds to be managed by a trustee due to the nature of his or her disability.

Drafting the Trust

As the Henson Trust derives its authority solely from the *Henson* case and not legislation,² one must be careful to adhere to the precedent set in the decision when including these provisions in a client's Will. An experienced estate planner would know that the provisions must not in any way fetter the absolute discretion of the trustees and the trust



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proceeds must not vest in the beneficiary while they are in receipt of ODSP benefits. With regards to the authority that the trust provisions give to the trustees to make payments out of the trust, the trustees must have absolute discretion with respect to the amount and timing of such payments and must consider the asset rules for ODSP eligibility when making payments to the beneficiary.

Other provisions that should be addressed when drafting a Henson Trust includes the rule against the accumulation of income beyond 21 years, and the naming of alternate beneficiaries who are to receive the payments of income that are in excess of what the primary disabled beneficiary can receive pursuant to the ODSP asset rules, after the expiration of the maximum period for accumulation of income.

Also, careful consideration must be given when selecting the trustee or trustees of the Henson Trust. In most cases, the trustee will be the same person that the testator or testatrix has appointed as his or her estate trustee. However, the testator or testatrix can provide for a separate "Special Trustee(s)" in his or her Will to be the trustee of the Henson Trust only.

Recent Cases

In the *Director of the Ontario Disability Support Program v. Mario Passaro*,³ the Ontario Superior Court of Justice held that non-earner benefits (as defined in the *Statutory Accidents Benefits Schedule of the Insurance Act*, R. S. O. 1990, c I-8) are not exempt as income for the purposes of determining ODSP eligibility. The court held that they did not fit squarely into the "award for pain and suffering" exemption since Mr. Passaro had not received an award that was designated as such nor could it be characterized as such. Additionally, the court held that, just because non-earner benefits have been likened to capital rather than income for the purposes of other statutes in other cases, it does not follow that they are not income for the purposes of this regulation.

Shortly after the court rendered its decision in the *Passaro* case, the regulation was amended to specifically provide that non-earner benefits are not exempt from income for the purposes of determining ODSP eligibility.⁴

In *Yeates v. Yeates*,⁵ a case decided by Justice Greer of the Ontario Superior Court of Justice, the parties were going through an acrimonious divorce and were the parents of three children, one of which was severely disabled. One of the outstanding issues was the support of the three children. The Justice held that ... "the husband shall name the wife as a Trustee of his group life insurance proceeds he has with his current employer, for the benefit of the parties' three children, as beneficiaries, to be used by her as she sees fit, for their benefit, without having to keep an even-hand among the three children. The wife shall keep in mind the benefits she is receiving for (the disabled child), in this regard, and to maximize these. In addition, the wife shall have the right to use a part of these funds to set up a

Henson Trust for (the disabled child's) benefit, if that is a reasonable step to take, if the husband predeceases the wife."

Conclusion

Estate planning for people with disabilities has evolved significantly over the last decade. Yet in practice, we are still finding a larger number of cases where clients are not fully aware of all of the options available for disabled beneficiaries. An experienced estate planner will utilize his or her expertise to assist clients in employing the tools available to make *inter vivos* and testamentary plans that will enhance the lives of their disabled loved ones.

¹ *The Director of the Income Maintenance Branch of the Ministry of Community and Social Services v. Henson* (1987), 28 Estates and Trusts Reporter 121 (Ont. Div. Ct.), affirmed (1989), 36 Estates and Trusts Reporter 192 (Ont. C.A.).

² Although the Henson decision has not been specifically translated into legislation, it has been recognized by the Ministry and referred to in ODSP Policy Directive 4.7.

³ 2010 (ON SC) 3322.

⁴ Subsection 43(3) of Ont. Reg 222/98 under the ODSPA.

⁵ 2007 CanLII 11728 (ON SC).