Supreme Court of Canada confirms that "Henson" trusts are a valuable tool for families with dependent disabled children or relatives

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Many Canadian families leave inheritances for their disabled children or relatives in a "Henson" or "absolute discretionary" trust. The main feature of these trusts is that assets held in trust do not **belong** to the disabled beneficiary because the trustee has an absolute discretion over whether, how much and when to distribute to the beneficiary. This means that the trust's assets are not counted as part of the disabled person's assets when applying for public support, e.g. from the Ontario Disability Support Program ("ODSP").

Background on the Case

The appellant, S.A., is a person with a disability. Her father's will set up a trust for her. The Will was deficient, but a court application was brought to revise its terms so that it became what all involved thought, based on Ontario law and long-standing practice across the country, was a Henson Trust that would protect S.A.'s entitlement to public subsidies.

The Vancouver social housing program where S.A. had lived for many years considered the trust to be "her asset" and asked for details about it. S.A. refused to provide this information and the result was that her application to renew her existing rent subsidy was rejected.

British Columbia's Supreme Court and Court of Appeal held that the trust was S.A.'s asset and she had to disclose information about it or lose her subsidy.

The Supreme Court of Canada disagreed and, holding that the trust was not S.A.'s asset, overturned the British Columbia Court of Appeal decision.

What the Supreme Court said

This is the first time that the Supreme Court of Canada has considered Henson Trusts. The Court identified the following key attributes of a Henson Trust:

1. The trustees of the trust have the ultimate discretion over any distributions that might be made of the trust income or capital;
2. Although the trustees may have an obligation to *consider* whether to make distributions out of the trust for a beneficiary's care and maintenance, they are not actually *required* to distribute any of the Trust's assets;
3. The trust cannot be unilaterally collapsed by the beneficiary.

Simply by clarifying the key attributes of a Henson trust the Supreme Court has provided great assistance to Canadian families with disabled children or beneficiaries. More than that, the Court confirmed that a beneficiary of a Henson Trust can also be *one* of the trustees, so long as there are other trustees and decisions must be made by majority rule. This, in effect, empowers persons with disabilities to play a role in decision-making for the trust even though they cannot have control of it.

It is sometimes argued that Henson Trusts may be used by relatively well-off people to gain unfair access to social programs. We have always found this argument unconvincing and so too did the Supreme Court. The Court held that Henson-type trusts cannot be treated as actually enriching a disabled beneficiary, because they are structured in a way that puts the trust property beyond that person's control. The Court recognizes that this is precisely the reason why *Henson* trusts are used as a means of setting money aside for persons with disabilities.

What the case means for you

The Supreme Court's decision confirms that the Henson Trust remains an important and reliable tool for estate planning to protect disabled persons. It opens the door to giving disabled persons the opportunity to play a direct role in administering their own trusts. Most importantly, the Henson Trust, which originated in connection with income support programs, like ODSP, maintains its key attributes in other contexts where support programs apply an asset means-test – unless the rules of a particular program overturn this result.

Ewa Krajewska of Borden Ladner Gervais represented the HIV & AIDS Legal Clinic Ontario and the Income Security Advocacy Clinic before the Supreme Court of Canada.

By

Arthur Fish

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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