

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

S. A.

APPELLANT
(Appellant)

and

METRO VANCOUVER HOUSING CORPORATION

RESPONDENT
(Respondent)

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I. OVERVIEW OF THE POSITION AND FACTS

1. Discretionary trusts, such as Henson trusts, are an important estate planning tool for families of persons with disabilities. The British Columbia Court of Appeal's decision (the "Appeal Decision"), if affirmed by this Court, may undermine the ability of those families to provide for their loved ones while preserving their entitlement to social assistance programs. In particular, the HIV & AIDS Legal Clinic Ontario and the Income Security Advocacy Centre ("the Coalition") will make submissions on:

- (a) the nature of Henson trusts:
 - (i) the essential *feature* of a Henson trust at common law: the beneficiary has no vested right to the trust's income or capital;
 - (ii) how that essential feature assists people with disabilities: they are not required to treat the trust *capital* as their own for the purpose of statutory assets and income tests for financial support or programs;
 - (iii) as their interest in the trust is entirely discretionary, persons with disabilities who are the potential recipients of Henson trusts should not be required to disclose the underlying information relating to the trust as their interest cannot be ascribed a value;
- (b) how the Appeal Decision leads to an outcome that is unsound from a legal and policy perspective: the purpose of Henson trusts would be undermined by the Appeal Decision's holding that whether benefits from a discretionary trust should count as an asset should vary from program to program, and;
- (c) how the Henson trust is not a windfall to the beneficiary, since any income or distribution that a beneficiary receives from a Henson trust is disclosable and is taken into account by social assistance programs.

2. The Coalition brings the perspective of low-income people living with disabilities in Ontario to this appeal. The Coalition takes no position on the facts.

II. POSITION

3. The Coalition submits that, absent specific statutory language to the contrary, the common law prevents social benefit programs from treating discretionary trusts, such as Henson trusts, as assets of a beneficiary. Henson trusts must be protected as an important tool that allows families to provide for their loved ones with disabilities while preserving their access to social programs.

III. ARGUMENT

A. The Characteristics of Discretionary Trusts

4. A Henson trust is a form of discretionary trust. When a person is the object of a Henson trust, that trust is not an asset of hers nor does she have a beneficial interest in the trust property.

5. A discretionary trust has the following characteristics:

- (a) Distribution of the income and capital of the trust are in the absolute discretion of the trustee(s);
- (b) There are remainder beneficiaries named who can take on the death of the person with disabilities or the termination of the trust so as to prevent the beneficiary from being able to call on the trustee to terminate the trust using the rule in *Saunders v Vautier*.¹

6. In the case of a Henson trust in Ontario, the trust instrument will also employ language that empowers the trustee to take into account the beneficiary's entitlement to government benefits or support when making distributions.

7. The name "Henson trust" arises from a decision of the Ontario Divisional Court (upheld on appeal). In that case, the Court held that the trust created for Audrey Henson did not provide her with a beneficial interest (the "*Henson Decision*"). The Henson Decision has been applied and followed across Canada except in Alberta.

¹ The rule in *Saunders v Vautier*, (1841), 41 E.R. 482 (Ch.D) is available where the beneficiaries of a trust have all attained legal capacity and together are entitled to all the rights of the beneficial ownership of the trust property.

8. Ms. Henson received social assistance as a person with a disability under the *Family Benefits Act* (the “*Act*”), the applicable legislation at the time.² Under the *Act*, an individual in Ms. Henson’s position was not eligible for an allowance if she had “liquid assets” exceeding \$3,000 in value.³ The Regulation made under the *Act* defined “liquid assets” as cash, bonds, stocks, debentures, an interest in real property [...] and any other asset that can be readily converted to cash” and included “**a beneficial interest in assets held in trust and available for maintenance.**”⁴

9. When her father passed away in 1981, his last will and testament provided for the creation of a trust wherein the trustees were given **unfettered discretion to pay income or capital for her benefit.**⁵ The will stated that Audrey was not to have a vested interest, save for payments to her, or for her benefit.⁶ Any income that was not distributed to her during her lifetime was to be accumulated and the capital of the fund was to be transferred to a charitable organization upon her death.⁷ The will also provided that:

Without in any way binding the discretion of my Trustees, it is my wish that in exercising their discretion in accordance with the provisions of this paragraph, my Trustees take account of and in so far as they may consider it advisable take such steps as will maximize the benefits which my said daughter would receive from other sources if payments from the income and capital of the residue of my estate were not paid to her for her own benefit, or if such payments were limited to an amount or time.

10. The question before the court was “simply whether or not the respondent has, ‘a beneficial interest in assets held in trust and available to be used for maintenance ...’”.⁸ The court concluded that because Ms. Henson could not compel the trustees to make payments even if there were not sufficient funds available to her under the *Act*, she did not have a beneficial interest in the trust. In other words, the trust did not fall into the definition of liquid asset under the *Act*. Ms. Henson’s

² *Ontario (Director of Income Maintenance, Minister of Community & Social Services) v Henson*, 1987 CarswellOnt 654 (Div Ct) at paras 3-4.

³ *Ibid.*

⁴ Section 3(2)(a) of Regulation 318 under the *Family Benefits Act*.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, at para 5.

assets were valued at \$1,295 and, as a result, she was eligible to receive monthly benefits through the *Act*.

11. A Henson trust has the following consequences that are founded on trust law:
- (a) The trust funds are beyond the reach of the beneficiary, because they have no ability to compel the trustee to make payments to him or her since the distributions from the trust are at the absolute discretion of the trustees;⁹
 - (b) The beneficiary has no vested interest in the trust's income or capital because the income and capital distribution are in the absolute discretion of the trustees;¹⁰
 - (c) The beneficiary, while the object of the trust, does not have a beneficial interest in the trust property;¹¹
 - (d) The trust funds do not interfere with beneficiary's qualification for government benefits because no interest in the trust funds vests in the beneficiary. The Henson trust, properly constituted, allows the beneficiary to retain entitlement to government benefits, while simultaneously deriving funds from the trust, at the trustee's discretion.¹²

12. In Ontario, the Henson trust is a type of discretionary trust. The distinguishing feature of the Henson trust in Ontario is language in the trust instrument specifically empowering or encouraging the trustee to take into account the impact of distributions on the beneficiary's entitlement to other benefits. This protects the trustee from possible complaint by the beneficiary if the trustee reduces distributions to take the entitlement to other benefits into account. However,

⁹ *Stoor v Stoor Estate*, 2014 ONSC 5684 at para 7.

¹⁰ Elisabeth Evans-Olders and Marilyn Piccini Roy, "Legitimacy Accorded in Quebec to Estate Planning Technique for the Incapable: Quebec (Curateur Public) c. A. N. (Succession de)", 33 *Est Tr & Pensions J* 236 (2014) at 236 [Evans-Older].

¹¹ *Ozad v Ontario*, 1998 Carswell Ont 6699 (Gen Div).

¹² *Soullière (Litigation Guardian of) v Robitaille Estate*, 2014 ONSC 851 at para 18; *Dillon v Dillon*, 2014 ONSC 2236 at para 286; *Quinn v Manitoba (Executive Director of Social Services)*, 1981 CanLII 2806 at para 13-14 (MB CA).

this feature of a Henson trust does not change the beneficiary's inability to compel distributions from the trust. The trustee still has complete discretion in that regard.

13. The *Henson* Decision was based on a fundamental principle of trust law that a beneficiary of an absolute discretionary trust does not have a vested interest in the trust property. For the British Columbia Court of Appeal to hold that being a beneficiary of a discretionary trust (such as a Henson trust) can count as an asset that can make a person ineligible for subsidized housing is inconsistent with that principle. It is established that an interest in a discretionary trust does not form part of the beneficiary's assets and is incapable of valuation.¹³

B. The Negative Effects of an *Ad Hoc* Approach

14. The premise of the decision under appeal is that the Henson trust *might* count as an asset of the beneficiary, depending on the policies of the subsidy administrator or social assistance agency at issue. This premise is unsound: entities that administer social benefits, whether government bodies or non-profit entities, should not have differing policies on whether a recipient has a beneficial interest in a discretionary trust. The governing principles are founded in the common law which applies to all of these entities. An *ad hoc* approach is wrong in law and undesirable for public policy reasons.

i. The common law applies

15. It is well-established that the common law is part of the "one law" that applies to both state agents and private citizens. All entities, whether government bodies or non-profit entities, must adhere to the rule of law.¹⁴ Whether this Court finds that the Metro Vancouver Housing Corporation ("MVHC") is a government actor or a non-profit entity administering government housing subsidy funds, it is subject to the common law. Similarly, administrative decision-makers "act as an arm of government". Accordingly, they are not "independent of government but, instead, are a part of government".¹⁵ Unless their enabling statutes provide otherwise, administrative

¹³ Donovan W M Waters, Mark R Gillen & Lionel D Smith, *Waters Law of Trusts in Canada*, (Toronto: Carswell, 2012) at footnote 155; see also *Dillion v Dillion*, 2014 ONSC 2236 at para 293; see also Evans-Older, *supra*, at 238.

¹⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 7.

¹⁵ Sara Blake, *Administrative Law in Canada* (LexisNexis: Toronto, 2017) at 3; *National Corn Growers Assn v Canada (Canadian Import Tribunal)*, [1990] 2 SCR 1324.

bodies exercising their mandates necessitate that they comply with the common law.¹⁶ Administrative decisions that do not comply with these legal rules violate the rule of law.

16. MVHC cannot as a matter of policy decide to ignore the common law principles of trust law. This applies equally to the administration of MVHC's rent assistance program – even if the nature of the decision regarding distribution of the subsidy is discretionary, as there is nothing in the nature of the discretionary decisions that exempts or insulates it from the rule of law. This means that MVHC needs to consider the characterization of discretionary trusts (including Henson trusts) in common law, that is that S.A. does not have a beneficial interest in the trust, when deciding (a) whether an applicant qualifies under the Asset Ceiling; and (b) when weighing one eligible candidate's application against others. So long as an applicant discloses sufficient information to prove that the trust in issue is a discretionary trust, no further information is necessary for the purposes of asset-related eligibility.

ii. Policy Reasons Militate against an *Ad Hoc* Approach

17. Persons with disabilities in Canada are more likely to live in deep poverty and remain poor over longer periods of time. They have lower incomes and higher levels of unemployment than persons without disabilities.¹⁷ Poverty has a serious detrimental impact on every aspect of life. It leads to poor health, food insecurity, housing instability or homelessness, lower educational attainment, and limited or lower paid work opportunities.¹⁸

18. For persons with disabilities living in poverty, income support benefit programs provide critical support for their wellbeing and survival, although the levels of support are inadequate and fall well below the poverty line.¹⁹ For them, a discretionary trust, such as a Henson trust can have

¹⁶ *Cardinal v Kent Institution*, [1985] 2 S.C.R. 643.

¹⁷ Organisation for Economic Co-operation and Development, *Sickness, Disability and Work: Breaking the Barriers: Canada: Opportunities for Collaboration*, (2010) at 18.

¹⁸ Canada, Employment and Social Development Canada, *A Backgrounder on Poverty in Canada*, (2016) at 10-27.

¹⁹ Lana Kerzner, Laurie Letheren, Susan J. Stamm, "Estate Planning and Persons with Disabilities: Use of Trusts in Ontario and other Canadian Jurisdictions" (May 2006) [unpublished] at 2; Anne Tweddle, Ken Battle, Sherri Torjman, *Welfare in Canada, 2014*, (Caledon Institute, 2015) at 41-42; John Stapleton, *The 'Welfareization' of Disability Incomes in Ontario*, (Metcalf Foundation, 2013) at 15.

a significant impact on their income security and help reduce their impoverishment. It allows families to provide for their disabled children after they die without jeopardizing their entitlement to necessary social assistance, including access to drug and other medical benefits.

19. In this context, the Appeal Decision has raised uncertainty about how a Henson trust will be treated by programs or administrators by implying that the recipient of such a trust has a beneficial interest in it. Moreover, the Appeal Decision appears to imply at paragraph 47 that whether a person has a beneficial interest in a discretionary trust may depend on a program's eligibility criteria. There are four policy reasons for rejecting such an *ad hoc* approach:

20. **Individuals seeking social assistance.** For individuals who are the object of a Henson trust, an *ad hoc* approach leaves them at the mercy of possibly conflicting governmental agencies' idiosyncratic policies with the result that vulnerable individuals may lose access to, among other things, social assistance, housing, disability benefits, and drug benefits as result of being named in a Henson trust. Such an outcome defeats the *raison d'être* behind Henson trusts and undermines our social safety net.

21. **Testamentary intentions and estate planning.** An *ad hoc* approach means that the testator and her estate planners cannot predict whether the assets she leaves for her vulnerable child will be of benefit to her and whether her beneficiaries—especially those with disabilities—will be adequately provided for. This places the testator in a terrible bind: she cannot be certain that her assets will be used in a manner to assist vulnerable members of her family. As a result of this uncertainty she may choose to disinherit that family member rather than risk causing that family member to lose essential supports.

22. **Governmental body.** An *ad hoc* approach places governmental bodies authorized to administer social assistance regimes in unenviable positions. It necessitates that each develop and implement complex policies on estate matters. Specifically, since whether a trust is a “Henson trust” often turns on the granular details of a will, an *ad hoc* approach places government agencies as the arbitrators of testator's intentions. The result is increased costs and greater exposure to litigation for governmental agencies.

23. **The Courts.** An *ad hoc* approach risks increasing litigation and exacerbating problems of access to justice.

24. The above four policy reasons necessitate rejecting the British Columbia Court of Appeal's *ad hoc* approach. Instead, the creation and the interpretation of discretionary trusts, including Henson trusts, must be done through a comprehensible framework: the common law.

C. Henson Trusts Do Not Create Windfalls for their Beneficiaries

25. While the Henson trust is now recognized as a standard estate planning technique and has attained an almost talismanic significance, it is not a panacea that resolves the challenges faced by persons with disabilities nor does it imply that persons with disabilities who have access to a Henson trust are taking advantage of social supports.²⁰ Some may think that those who are named as objects of a trust should not receive social assistance since the trust can provide for them. If such individuals were to receive social assistance, they would be taking advantage of the system. Instead, it may be argued, social assistance and housing subsidies should be reserved for people in dire circumstances, especially those who do not have access to other means of support.

26. Such an argument is untenable when closely scrutinized and placed into context. The Henson trust does not create a windfall for beneficiaries.

27. Importantly, the Henson trust protects the child with disabilities from being disentitled to public support only if distributions from the trust are kept below modest limits.²¹ These limits on payments can keep social assistance recipients – even ones who sometimes receive payments from a Henson trust from rising above the poverty line in Canada.²² In essence, to maintain public

²⁰ See discussion by Arthur Fish in “Melting the Iceberg: Estate Planning for the Parents of Disabled Children”, 30 *Est Tr & Pensions J* 26 (2010) at 54 [Fish].

²¹ For example, under the regulation made under the *Ontario Disability Support Program Act*, 1997, (S.O. 1997, c. 25, Sch. B), recipients of benefits may receive a maximum of \$10,000 in payouts per year from a Henson trust without losing some benefit payments. It was recently changed to \$10,000; previously it was \$6,000 as stated in this Ministerial Directive (at 5): see Ontario, Ministry of Community and Social Services, *Social Assistance Policy Directives, Ontario Disability Support Program: Income Support: Assets: Funds Held in Trust*, (September 2017).

²² The poverty line in Canada is \$22,133 annual income; Statistics Canada, 2016 Census of Population, Table 4.2: Low-income measures thresholds (LIM-AT and LIM-BT) for private households of Canada, 2015 (2016).

support, the trustee must keep the beneficiary impoverished. As such, estate planners would recommend to wealthy families who can afford to maintain their children without public support that they should consider using an alternative to the Henson trust.²³

28. Taking Ontario's disability benefit program as one example, the asset exemption for Henson trusts is just one of over 80 income and asset exemptions that allow recipients to maintain access to social assistance while benefiting from income and assets from other sources. Other asset exemptions include monies held in Registered Disability Savings Plans, damages awards for pain and suffering and segregated funds.²⁴ Henson trusts allow social assistance recipients to access the meagre benefits available through income support programs while allowing for the possibility of family support for those needs that are not met. This is a desirable alternative to having an inheritance result in the loss of government support even where the inherited funds would be insufficient to support the person with a disability through their lifetime. That outcome is not unfair. Rather, it allows families, communities and government to share in the responsibility for supporting persons with disabilities, a stated purpose of Ontario's legislation.²⁵

29. Every province but Alberta has acknowledged the legitimacy of the Henson-type trust as a vehicle for estate planning,²⁶ thus implicitly acknowledging the social value of using public support programs to offset the extraordinary financial burdens imposed on families with children with disabilities. Persons with disabilities and their families face extraordinary financial burdens as a result of the higher out-of-pocket costs associated with living with a disability while facing disability related (or socially created) limitations to employment which lead to the necessity of access to social assistance.

30. As a result, the income that a person with a disability receives from a Henson trust is taken into account when deciding on the eligibility for and the amount of support received from various programs.

31. Thus, the distributions that a recipient receives from a Henson trust are not a windfall. As well, distributions from a Henson trust may also be subject to the *Income Tax Act*. "Income that is

²³ See discussion by Fish, *supra*, at 54.

²⁴ O. Reg. 222/98, ss. 28, 41-43.

²⁵ *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B., s. 1.

²⁶ Fish, *supra*, at footnote 6.

earned in a trust and paid or made payable to a beneficiary will generally be taxed in the beneficiary's hands."²⁷ In addition, any income that is earned and retained in either an *inter vivos* Henson Trust or a testamentary Henson Trust will be taxed in the hands of the trust at the highest combined federal and provincial marginal tax rate in the trust's province or territory of residence.²⁸

32. The above regulatory frameworks establish that Henson trusts are supported, scrutinized and appropriately taxed. Further, social assistance programs require reporting of all payments paid out to an individual. Hence, any concern about the fairness of a beneficiary of a Henson trust accessing social assistance and subsidy programs is misplaced.

33. This Court should uphold the longstanding trust principles that a beneficiary of a discretionary trust, such as a Henson trust, does not hold the assets of that trust. To decide otherwise would be a significant reversal in trust law. Furthermore, in the context of Henson trusts that are designed to be of assistance to those with disabilities, it would undo over thirty years of established estate planning for families with persons with disabilities and would put those persons in a further precarious position. Such a dramatic change should only be done by the legislature.

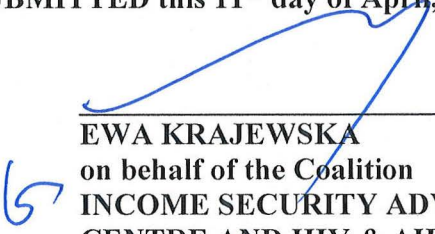
IV. SUBMISSION ON COSTS

34. The Coalition does not seek costs and asks that none be awarded against them.

V. ORDER SOUGHT

35. The Coalition has been granted permission to present oral argument not exceeding five minutes at the hearing of the appeal and therefore does not seek an order from this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2018.



EWA KRAJEWSKA
 on behalf of the Coalition
INCOME SECURITY ADVOCACY
CENTRE AND HIV & AIDS LEGAL
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²⁷ Lendra Lathan, Joanne Chisamore, *The Navigator: Henson Trusts: Planning for Persons with Disabilities*, (RBC Wealth Management, July, 2017)

²⁸ *Ibid.*

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John Stapleton, <i>The ‘Welfareization’ of Disability Incomes in Ontario</i> , (Metcalf Foundation, 2013)	18
Lana Kerzner, Laurie Letheren, Susan J. Stamm, “ <u>Estate Planning and Persons with Disabilities: Use of Trusts in Ontario and other Canadian Jurisdictions</u> ” (May 2006) [unpublished]	18
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