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The Dubious Status of Henson Trusts

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Once a settlement amount is agreed upon, there is often much additional work to be completed prior to closing a file. Structuring a settlement, while typically largely the responsibility of the plaintiff or prospective plaintiff, can often cause significant delay in the final resolution of a file.

In order to maximize the amount received through settlement, plaintiffs who are recipients of benefits through the *Ontario Disability Support Program* ("*ODSP*") will often try to create what is known as a Henson trust, in order to try to avoid negatively affecting their eligibility for benefits. This paper explains the origins and applicability of Henson trusts in personal injury settlements.

The purpose of a Henson trust is to ensure the beneficiary retains entitlement to government benefits while simultaneously deriving funds from the trust. Where money from a regular trust is paid directly, as of right, it is unsheltered and becomes income in the hands of the recipient.[1]

The primary difference between an annuity and a Henson trust is the payment method. With an annuity, a periodic payment is negotiated, whereas with a Henson trust, by definition, the payment is *entirely discretionary.* The recipient has no specific entitlement to the trust funds.

The origin of Henson trusts was not from a personal injury context, but rather an estates matter. Henson trusts are named after Audrey Henson,[2] a developmentally disabled adult who resided in a group home. She covered her expenses through an allowance that she received from the *Family Benefits Act* ("*Act*"), the applicable legislation at the time. Under the *Act*, an individual in Ms. Henson's position was not eligible for an allowance where she had "liquid assets" exceeding $3,000.00 in value. Ms. Henson's assets were valued at $1,295.00, and as a result, she obtained monthly benefits through the *Act*.

In 1981, Ms. Henson's father passed away, leaving her a discretionary trust. The trustees were given *unfettered* discretion to pay income or capital for her benefit. The will specifically stated that the respondent was *not* to have a vested interest, save for payments to her, or for her benefit. 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.

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[1] *Keddy v. Ontario (Director, Disability Support Program),* [2002] O.J. No. 3991.
[2] *Ontario (Director of Income Maintenance, Minister of Community & Social Services) v. Henson,* Doc. No. CA 121/89.

The Ministry of Community and Social Services took the position that the testamentary gift was a “liquid asset” and given that the trust amounted to approximately $82,000.00, the Ministry cancelled her allowance.

"Liquid assets" were defined by s. 1(1)(a), as am. O. Reg. 654/82, of Reg. 318 as follows:

> '[L]iquid assets' means cash, bonds, stocks, debentures, an interest in real property, **a beneficial interest** in assets held in trust and available to be used for maintenance, and any other assets that can be readily converted into cash.

The Social Assistance Review Board reversed the Ministry’s decision. The Director appealed to the Divisional Court but the appeal was dismissed. The Divisional Court held that the respondent did *not* have a beneficial interest, as that term was used in the definition of "liquid assets", since the will gave the trustees *absolute and unfettered discretion* and the respondent *could not compel the trustees to make payments to her*.

The Director appealed to the Court of Appeal, which dismissed the appeal, without reasons.[3]

Since that decision, the legislation has changed, but the same rules apply to individuals currently receiving *ODSP* benefits. Similar to the program under the *Family Benefits Act*, in order to be eligible for *ODSP*, the recipient must own less than $5,000 in assets. While there are ways of obtaining approval for the accumulation of more assets, and while some assets are exempt (such as a principal residence), proceeds from a personal injury settlement, or a damages award, affect eligibility.

In 2005, the Social Benefits Tribunal confirmed that an individual receiving *ODSP* could be supported by money in a Henson trust (which was created in a will). Given that the individual could not force the trustees to provide any money from the trust, the money in the trust was not an asset, and the individual could still continue to receive *ODSP* benefits.

However, it is important to note that while there is no limit on the value of the assets that can form part of the Henson Trust, *ODSP* regulations now only permit a recipient to receive a *maximum* of $6,000.00 in any 12 month period from gifts (which includes money from the trust). If more is paid, then *ODSP* payments will be correspondingly reduced.

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[3] *Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson,* 36 E.T.R. 192, 1989 CarswellOnt 542, [1989] O.J. No. 2093 (Ont. C.A., Sep 22, 1989).

Henson Trusts for Personal Injury Settlements

Where the plaintiff is a recipient of *ODSP*, plaintiff's counsel might try to preserve *ODSP* benefits through the creation of a Henson trust. The decisions cited above were in the context of testamentary gifts and not personal injury settlements. Additional considerations apply in the context of personal injury settlements which do not support the use of Henson trusts.

Firstly, it is important to note that the *ODSP* eligibility is *not* affected by payment of damages or compensation up to a maximum amount of $100,000 for pain and suffering, *Family Law Act* damages, or expenses incurred as a result of injury or death. Any settlement amount within this exemption does *not* need to be placed in any type of trust and can be spent in any manner.

Moreover, the Director of the *ODSP can* approve an amount exceeding $100,000.00, where the amount exceeding $100,000 is used, or will be used, for disability or injury related expenses. The Director must also be satisfied that appropriate arrangements are in place for the administration of the amount in question.

Where the settlement exceeds $100,000.00 for general damages or *FLA* damages, and where the Director's approval cannot be obtained to shelter more funds, plaintiffs' counsel might wish to create a Henson trust.
However, from the *ODSP*'s point of view, as set out in their Policy Directive, while *ODSP* accepts that the interests of recipients in Henson trusts are not considered assets for *ODSP* purposes, the trusts must nonetheless be validly created.

With a will, the trust is created by the testator. However, practically speaking, in order to put proceeds of a personal injury settlement or award into a Henson trust, the recipient would have to give/transfer ownership of the settlement proceeds to the settlor of the trust. The applicable legislation prohibits gifting away assets for the purpose of maintaining *ODSP* eligibility. There has not yet been any judicial consideration of whether or not a Henson trust violates the portion of the legislation regarding gifting assets for the purpose of maintaining eligibility. Therefore, Henson trusts will likely continue to be recommended by plaintiffs' counsel until such a decision is rendered.

Another issue that has arisen regarding Henson trusts is that where a party is under a disability, and court approval of a settlement is required, the Public Guardian and Trustee will *not* likely approve a settlement that includes a Henson Trust.

An example of this can be found in a recent 2014 decision, *Soullière (Litigation guardian of) v. Robitaille Estate*[4], wherein Justice Roccamo considered a motion for the approval of fees for services rendered to the plaintiff, who became disabled after being catastrophically injured. The motion also considered whether to approve the allocation of part of the settlement funds to a proposed Henson-style trust.

[4] 2014 ONSC 851

The plaintiff's litigation guardian created a trust, which was described as a trust that was **"**created in the spirit of the 'Henson trust.'" The effect of the Henson trust was to remove the assets of the trust from the control of the beneficiary, so that the assets would not form part of the "income" or "assets" of the person for the purposes of qualifying for benefits under the *ODSP.* In other words, the effect of the trust was to divest settlement funds from the plaintiff to the trust.

The Public Guardian and Trustee ("PGT") recommended that Justice Roccamo *not* approve the trust agreement. The PGT submitted that the trust agreement was void on the basis that it did not comply with the *Substitute Decisions Act*, *1992*, S.O. 1992, c. C-30 (*"SDA*").

According to the *SDA*, litigation guardians have *no* authority to set up a discretionary trust with the settlement funds. Furthermore, Henson trusts, because they are absolutely discretionary, include a provision for the funds in the event of the beneficiary's death. The PGT argued that since a guardian of property cannot make a will or testamentary disposition for an incapable person,[5] the litigation guardian could not create a trust that purports to distribute the income after the plaintiff's death.

Unfortunately, the plaintiffs did not provide a response to PGT's submissions. As a result, Justice Roccamo did *not* provide detailed reasons regarding her decision on this point. Justice Roccamo simply ordered that, subject to counsel's further submissions, the trust agreement was of no force or effect.

Overall, Henson trusts, while still often proposed by plaintiffs' counsel, are of very limited application. It is possible that further judicial consideration will eliminate them altogether. Moreover, creating the trust often delays settlement and adds increased costs to the action. Prior to agreeing to a settlement including a Henson trust, we recommend seeking legal advice.

[5] *Substitute Decisions Act*, s. 31.