

Henson Trusts - A Need for Reform?

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Introduction

Estate planning serves a vital function in the management and administration of one's financial affairs after death. For instance, effective estate planning can aid in minimizing the impact of probate and income taxes on an individual's estate upon death.¹ Protecting against wealth erosion is particularly important for people from low-income households who are leaving behind dependants, such as a disabled child or spouse. These disabled beneficiaries will most likely continue to need ongoing support from the deceased's estate in order to maintain their standard of living. Due to this potential reality, *Henson* trusts have become a popular estate planning tool for trust and estate lawyers.²

A *Henson* trust, sometimes referred to as an absolute discretionary trust, grants the trustee complete discretion in the amount of capital they can allocate from the trust to the disabled beneficiary.³ The trust's discretionary nature creates no legal interest in the trust property for the beneficiary, thereby still making the beneficiary eligible for means tested government support programs, such as subsidized housing or income assistance.⁴ Therefore, *Henson* trusts help ensure the longevity of the disabled beneficiary's own financial resources by having other avenues of support available.⁵ However, despite the economic boon that *Henson* trusts are able to provide, there is cause for concern. The fact that the trust is completely discretionary leaves these potential beneficiaries entirely at the mercy of the trustee(s). Furthermore, there is the issue of *Henson* trusts being used as sham trusts, where the beneficiary has control over the trust property in all but name. To make matters worse, there has been a noticeable absence in both case law and government legislation in Ontario in addressing these issues.

Self-serving and Overbearing Trustees

Conflicts of Interest

Given the level of freedom trustees have in *Henson* trusts, serious misuse can arise if the trustee in question has motives other than helping the disabled beneficiary. Due to the personal nature

¹ Christine Van Cauwenberghe, "Segregated Funds - A Unique of Investment" (2013) 32: 4 Estates, Trusts & Pensions J 363 at 365 [Cauwenberghe].

² Joel Nitikman, "Henson Trusts: A Sham in Sheep's Clothing: A Comment on *S.A. v. Metro Vancouver Corp*" (2019) 38: 3 Estates, Trusts & Pensions J. 205 at 207 [Nitikman].

³ Adam Parachin, "Trusts and Accumulations of Income" (2010) 29: 1 Estates, Trusts & Pensions J. 41 at 92 [Parachin]; *Ontario (Ministry of Community and Social Services, Income Maintenance Branch) v. Henson*, [1989] O.J. No. 2093, 36 E.T.R. 192 (C.A.) [*Henson*].

⁴ *Henson*, *supra* note 3; Nitikman, *supra* note 2.

⁵ Elisabeth Evans-Olders & Marilyn Piccini Roy, "Legitimacy Accorded in Quebec to Estate Planning Technique for the Incapable: Quebec" (2014) 33: 3 Estates, Trusts & Pensions J. 236 at 242 [Evans-Olders et al.].

of these kinds of trusts, a reoccurring theme that settlors engage in is naming a close family member or friend to act as trustee.⁶ One of the biggest problems in assigning a close family member as a trustee, such as a sibling, is that they are oftentimes named as a beneficiary to the remainder of the trust.⁷ This is likely to create conflicts of interest, in which the trustee(s) may be less inclined to disperse of the trust capital because the more they allocate to the intended recipient, the less they will inherit for themselves. This is seen in the case of *Borges*, where a mother sets up a *Henson* trust for one of her children, but the trustees who were entitled to the remainder withheld the funds.⁸ Despite the court ruling in favour of the trustees in *Borges*, in *obiter*, the Judge addressed the trustees' actions as going against the settlor's desired intentions of ensuring the beneficiary's well-being.⁹ Thus, the discretionary nature of *Henson* trusts allow for opportunities to arise in which self-serving trustees can enrich themselves, all the while keeping the trust recipients in an economically vulnerable state. Given the court's stance on beneficiaries not having legal standing to enforce payments, should the courts not consider the rights and interests of the settlor?

Domineering Trustees

Since the trustee has the final say in whether the trust capital is to be dispersed, the beneficiary is heavily reliant on the goodwill of the trustee for economic support.¹⁰ This in turn creates a substantial power imbalance between the trustee and the beneficiary regarding their relationship both within and outside the trust. Concerns have been raised regarding malicious or overbearing trustees using their position as leverage to exert control over the beneficiary in their daily life.¹¹ Failure to comply with a trustee's demands could result in the beneficiary being withheld funds for an indefinite period of time. The trustee could even use the trust as a way to disqualify the intended beneficiary from means tested public support.¹² Additionally, given that these beneficiaries are suffering from physical or mental disabilities, they are in greater need for medical equipment and health services, which can be costly – especially when the disability is severe or long-lasting.¹³ Therefore, these beneficiaries are likely to be more susceptible to following an overbearing trustee's demands.

Problems with Preventative Measures

Employing the services of a trust company to oversee the disbursement of funds would help in addressing the problems of self-serving and malicious trustees. However, this alternative is not

⁶ Anne Werker, "The Percentage Trust: Uniting the Objectives of the Life Tenant and Remainder person in Total Return Investing by Trustees" (2006) 25 Estates, Trusts & Pensions J. 329 at 338 [Werker].

⁷ Arthur Fish, "Melting the Iceberg: Estate Planning for the Parents of Disabled Children" (2011) 30: 1 Estates, Trusts & Pensions J. 26 at 48 [Fish].

⁸ *Borges v. Santos*, 2017 ONCJ 651 [*Borges*].

⁹ *Ibid.* at 70-71.

¹⁰ Fish, *supra* note 7 at 54.

¹¹ Carolyn Hogan, "The Role of the Courts in a Trustee's Exercise of Discretion: A Comment on Re Toigo Estate" (2019) 38: 4 Estate, Trusts & Pensions J. 309 at 312 [Hogan]; *Fox v Fox Estate* [1996] O.J. No. 375, 28 O.R. (3d) 496 (C.A.) [*Fox*].

¹² *Novak v. Novak Estate*, 2019 SKQB 261 [*Novak*].

¹³ Fish, *supra* note 7 at 46.

ideal because it can be incredibly expensive, even for modest estates. This is significant to note since *Henson* trusts are generally geared towards assisting disabled individuals from poor backgrounds.¹⁴ While hiring a trust company is attainable for affluent individuals, settlors from low-income households are less likely to follow suit because they would perceive it as wasting their already limited resources, which could otherwise be used for the disabled beneficiary's benefit.¹⁵

The removal of the trustee is another unappealing alternative due to the fact that it is a time-consuming and expensive process, even in instances where there is a clear finding of abuse of power by the trustee.¹⁶ To add to this fact, a beneficiary's disability may further hinder themselves from seeking legal counsel and bringing a claim for removal. Even if a claim to remove a trustee were to reach the courts, unless there is a suitable trustee lined up, the severity of abuse by a trustee must be especially egregious for a court to remove them.¹⁷ While the existence of the Office of the Public Guardian and Trustee (OPGT) could help resolve this matter, the courts lack the authority to order the OPGT to step in as trustee.¹⁸

Sham Trusts

Blurring Lines between Henson and Sham Trusts

Sham *Henson* trusts are problematic as they allow for beneficiaries who control the entirety of the trust to obtain social assistance. Thus, while these beneficiaries appear poor on paper for the purpose of receiving additional government support, their absolute control over the funds practically guarantees that the trust property is theirs.¹⁹ There have been several cases in recent years that suggest that beneficiaries have more than a mere hope of obtaining money from a *Henson* trust in Canada. Funds from *Henson* trusts have been used to pay for beneficiaries' ongoing court fees on legal matters such as support obligations and qualifying for government benefits.²⁰ This seems to suggest a certain degree of certainty from the beneficiaries that by proceeding with their legal claims, their interest in the trust will aid in covering court expenses. The Supreme Court has also recently ruled that beneficiaries are permitted to serve as co-trustees in the very same trust as well as have the ability to choose other co-trustees.²¹ One legal scholar aptly described the current state of *Henson* trusts as beneficiaries having their cake and eating it too.²² The reason for this is because beneficiaries

¹⁴ Nitikman, *supra* note 2 at 213-214.

¹⁵ Fish, *supra* note 7 at 47.

¹⁶ Hogan, *supra* note 11 at 312-313.

¹⁷ *Ibid.* at 314.

¹⁸ *Potrzebowski v. Potrzebowski*, 2016 ONSC 6981 at para. 9 [*Potrzebowski*].

¹⁹ Nitikman, *supra* note 2 at 213.

²⁰ *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 [S.A.]; *Bigelow Estate (Re)*, [2008] O.J. No. 3856, 170 A.C.W.S. (3d) 433 (Sup. Ct.) [*Bigelow*]; *Ontario (Ministry of the Attorney General) (Re)*, [2015] O.I.P.C. No. 4 [*Ontario MAG*].

²¹ *S.A.*, *supra* note 20.

²² Nitikman, *supra* note 2 at 214.

are able to benefit from the trust's certain and repeated disbursements while still being able to claim that it is not an asset for means tested reasons.

Negative Societal Impact

A serious consequence regarding the exploitation of *Henson* trusts is the burden it places on social support programs that aid people with disabilities. Since these government programs are meant for society's most economically vulnerable, their increased usage by undeserving individuals unnecessarily strains these initiatives' limited resources.²³ Furthermore, *Henson* trusts may be inappropriately used by individuals to avoid other responsibilities, such as paying child or spousal support.²⁴ This not only negatively impacts the living conditions of the child and/or spouse seeking support, but potentially taxpayers as well. Due to a child or spouse's inability to garnish from a *Henson* trust, this may place them in such an economically vulnerable position that they must then apply for government aid.

Conclusion

While *Henson* trusts may have served an altruistic purpose at the time of its inception in terms of helping a vulnerable class of people, the absence of legislative reform has since created opportunities for misuse and abuse. Attempts at resolving these matters by way of removal of trustees or naming impartial trustees has been met with numerous complications ranging from the cost and availability of alternate trustees to the judiciary's reluctance in interfering in trust disputes. *Henson* trusts have also created opportunities for undeserving individuals to exploit social service programs. In order to better combat these issues, it is recommended that the judiciary and legislature have a more lenient test for the removal of trustees in *Henson* trusts, bestow social service agencies the authority to garnish from *Henson* trusts, as well as reinforcing a stricter arms-length principle between the beneficiary and the trust.

²³ Fish, *supra* note 7 at 46.

²⁴ Nitikman, *supra* note 2 at 207, 213; *Ontario MAG*, *supra* note 20 at 17; *Borges*, *supra* note 8 at para 71.