



What is a Henson Trust (Absolute Discretionary Trust)?

By Doug Laughton, Partner, Tierney Stauffer LLP

A Henson Trust is an excellent way to allow for financial care for disabled children after the death of the parent(s). The terms Henson Trust, Absolute Discretionary Trust and Discretionary Trust are used interchangeably and refer to a very specific type of trust when used in the context of planning for a person with a disability.

The purposes of a Henson Trust are to protect the assets (typically an inheritance) of a disabled person, as well as that person's rights to collect government benefits and entitlements.

The key provision of a Henson Trust is that the trustee has "absolute discretion" in determining whether to use the trust assets to provide assistance to the beneficiary, and in what quantity. This provision means that the assets do not vest with the beneficiary and thus cannot be used to deny means-tested government benefits.

In addition, the trust may provide income tax relief by being taxed at a lower marginal rate than if the beneficiary's total assets were considered. It can also be used to shield assets from matrimonial division in case of divorce of the beneficiary. In most cases, the trust assets are immune from claims by creditors of the beneficiary.

A Henson Trust can be established either as an Inter Vivos (Living) or a Testamentary Trust (Created by last Will and Testament). The most commonly used type of Henson Trust is the Testamentary Trust established in a parent's or caregiver's Will.

History of the Henson Trust

Leonard Henson had a daughter named Audrey. Audrey was a person with a developmental disability and she lived in a group home managed by the Guelph Association for Community Living. Leonard knew that if he left his estate directly to his daughter, it would exceed the allowable asset limits as set out by the Family Benefits Allowance (now called the Ontario Disability Support Program). He realized that having assets in the hands of his daughter directly would not be to her advantage and that her benefits would be terminated until the assets were "spent down" to a level below the threshold amount. In addition, Leonard's wife had pre-deceased him and he had no other family.

Leonard discovered a technique that would allow Audrey to retain her government benefits while at the same time allowing her to receive quality of life enhancements from his estate. That technique was the use of the Absolute Discretionary Trust to be created in his Will as a Testamentary Trust. The Will required the creation of an Absolute Discretionary Trust which appointed the Guelph Association for Community Living as Trustee and his daughter Audrey as beneficiary of the trust. Once Audrey died, his Will instructed that the remaining funds in the Trust were to be passed on to the Guelph Association for Community Living.



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The Ministry of Community, Family and Children's Services (the ministry which controls the FBA (ODSP)), determined that Audrey had inherited the estate of her father and since it was in excess of the allowable amount of assets, they terminated her benefits. The Guelph Association for Community Living challenged this decision and the Ministry took the trust and the Trustee to court. The first court found that the funds contained in Audrey's trust account did not meet the FBA (ODSP) definition of assets and therefore, it ruled in favour of the Trustees. The Ministry launched an appeal. The appeal reached the Supreme Court of Ontario and in September of 1989 was dismissed. The court allowed the trust to benefit Audrey without affecting her government benefits.

That decision has enabled families who have a son or daughter with a disability and are residents of Ontario with a vehicle in which they can place assets for their children without disqualifying them from receiving the ODSP payments to which they would otherwise be entitled.

For further information or assistance, please contact Douglas Laughton, Partner, Tierney Stauffer LLP at 613-288-3225 or dlaughton@tslawyers.ca.