



What is a Henson Trust?

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A Henson trust is a type of trust often used to benefit persons with disabilities who are receiving means-tested social assistance such as income support through the Ontario Disability Support Program (ODSP). The trust is designed to ensure that the beneficiary's interest in the trust is not considered an asset when determining the beneficiary's eligibility to receive support. Its name originates from the Ontario Court of Appeal case that confirmed the effectiveness of such a trust for persons with disabilities in Ontario wishing to preserve government disability benefits: *Ontario v Henson*, (1989) OJ No 36 ETR 192 (ONCA).

Eligibility for and quantum of government assistance such as ODSP is usually determined based, in part, on an applicant's income and/or the value of the applicant's assets. A beneficiary's interest in a regular trust (eg. not a Henson trust) must normally be included when valuating his, her or their assets for eligibility and quantum purposes, regardless of whether any distributions are made from the trust. Beneficiaries of Henson trusts, however, hold no vested trust interest and, accordingly, the value of their assets are not affected by virtue of them being named as beneficiaries.

To be a Henson trust, a trust must contain the following terms: (i) it must be absolutely discretionary in nature, meaning that the trustees have the complete and unfettered discretion in determining whether to make distributions to a beneficiary; (ii) the beneficiary cannot have any right to compel a distribution of funds from the trust; and (iii) the beneficiary cannot unilaterally collapse the trust. The absolute discretionary nature of the trust ensures that the beneficiary has no control nor vested interest in the trust fund. The result is that the trust itself is not an asset of the beneficiary. Only distributions actually paid out from the trust would be considered an asset/income of the beneficiary.

The use of Henson trusts as a valid estate planning tool was recently confirmed in 2019 by the Supreme Court of Canada (SCC) in *SA v Metro Vancouver Housing Corp*, 2019 SCC 4.

It is important to seek legal advice when considering whether to set up a Henson trust, as there are various factors to take into consideration.



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