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# GIVING TO THE POOR: THE AVAILABILITY OF TRUST ASSETS UNDER THE FAMILY BENEFITS ACT

Peter Showler\*

## RÉSUMÉ

Cet article passe en revue le traitement des fonds en fiducie conformément à la *Loi sur les prestations familiales* par les tribunaux et par le ministère des Services sociaux et communautaires, dans les circonstances où le bénéficiaire de fonds est aussi bénéficiaire de prestations familiales.

In order to receive social assistance in Ontario, one of the obvious requirements, whether under the *Family Benefits Act*<sup>1</sup> or the *General Welfare Assistance Act*,<sup>2</sup> is to be poor or, in the official parlance, "in need". Under the *Act*,<sup>3</sup> poverty is measured in two ways, by income and by assets. The *Family Benefits Regulations*<sup>4</sup> define the permissible levels of income and assets. Although not particularly generous, income levels are treated in a reasonably straight-forward manner. Assets, on the other hand, are ambiguously defined and, more importantly, broadly interpreted by the Ministry of Community and Social Services (hereinafter COMSOC).

Under the *Regulations*, only the applicant's "liquid" assets are considered in regard to eligibility and they are defined as follows:

" 'Liquid assets' means cash, bonds, stocks, debentures, and 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."<sup>5</sup>

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1. *Family Benefits Act*, R.S.O. 1980, c.151 [hereinafter *Act*].
2. *General Welfare Assistance Act*, R.S.O. 1980, c.188.
3. For purposes of simplicity, this paper will deal solely with the *Family Benefits Act*. The provisions of the *General Welfare Assistance Act* operate in a similar manner.
4. R.R.O. 1980, Reg. 318, [hereinafter *Regulation*].
5. *Ibid.* at s.1(1)(a).

The *Regulation* then lays out a list of exceptions to the definition which are not included in the calculation, such as student loans, Child Tax Credits, cash surrender value of life insurance policies, the family home.<sup>6</sup> The underlying policy issue behind the definition and its exceptions is this: "How close to the bone must a person be stripped before we, the state, provide assistance?" The answer, from the legislature has been: "Pretty far, but not all the way". Although the *Regulation* allows for the conversion of personal property which can be "readily converted into cash", there appears to be no policy or practice for family benefits workers to conduct inventory audits to review the family jewels or heirlooms for saleability. Given the asset levels of most recipients, the question of whether the Van Goghs have to go, seldom arises.

However, in the past few years, a controversy has emerged over the treatment of trust assets which has produced a series of relatively unanimous responses from the Ontario Divisional Court. The issue has arisen over the status of discretionary trust assets given to social assistance recipients by others; potentially, both the income and capital of the trust fund could be taken into consideration in re-assessing the beneficiary's eligibility for social assistance. Within the context of the *Family Benefits Act*, the two most common trust situations have occurred with trust funds for disabled or permanently unemployable recipients and trust funds given to children of sole support parents.

Given that a "liquid asset" includes "a beneficial interest in assets held in trust and available to be used for maintenance", COMSOC took the position that where the trustee had the discretionary power to pay out any of the trust assets, then the assets were "available", under the *Regulations*, and the trust capital must therefore be expended before the recipient would regain eligibility for family benefits.

The COMSOC policy guideline reads as follows:

"[In a] 'private trust' situation, [if] the Trustee is given power to encroach on capital, then all the funds are available. If the Trustee can pay out income only, then the capital is not available. ... Where the Trustee is not willing to make the funds available the worker should consult with the Supervisor".<sup>7</sup>  
[my emphasis]

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6. *Ibid.*

7. *Family Benefits Act: Policy and Procedural Guidelines* (Toronto: Income Maintenance Branch—Ministry of Community and Social Services) at Index Number 28, date 6/86 at s. 3.0(B)

The guideline clearly allows discretion to the supervisor to moderate the eligibility requirements of the *Regulation* when confronted with a reluctant trustee, who would ordinarily enjoy a broad discretion to encroach on the capital and would be understandably reluctant to exhaust the capital to relieve COMSOC of its statutory obligations.

In the past, COMSOC would often negotiate a settlement whereby some or all of the interest income would be paid to the recipient, leaving the trust capital intact.<sup>8</sup> Frequently, the interest income would be paid annually, in a lump sum, thereby limiting loss of eligibility to one month per year. If the payment exceeded the asset limit (normally \$5,000.00 or \$3,000.00, depending on the recipient's status) arrangements would be made to expend excess income on necessities, such as furniture, appliances, a family home, and so on.

In recent years, informal COMSOC policy has shifted towards a more parsimonious exercise of the supervisor's discretion. A particularly odious example of that parsimony occurred in Ottawa in 1988 where a sole support mother with two children was completely cut off from her family benefits when one of the children received a testamentary gift of \$11,000.00, although the gift was to be held in trust until the child was eighteen years of age.<sup>9</sup> Under the *Regulation*, the income and assets of dependent children are attributed to the sole support parent.<sup>10</sup> The trustee, a solicitor, held complete discretion over the capital and interest income. In response to a request for payment of the funds, the trustee expressly stated that no money would be paid out, except for necessities, until the child was eighteen years of age. The testator, a friend of the family, had said the gift was intended for the child's education (although no reference to education was made in the will) and the trustee therefore did not intend to dissipate the funds in support of the entire family.

COMSOC took the position that by cutting off family benefits, the child was in need of necessities and therefore the trustee had an obligation under the will to pay support out of the trust capital. In essence, the Director of Income Maintenance decided to play a game of financial "chicken" with the trustee although he, of course, was not in the car. After the Director's decision was

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8. This comment is based on personal and anecdotal experience.

9. *Walker v. The Director of Income Maintenance Branch, Ministry of Community and Social Services* (17 October 1988), (Social Assistance Review Board) [unreported].

10. *Supra*, note 4 at s.3(1)(b).

appealed to the Social Assistance Review Board, the manifest ruthlessness of the decision and lack of legal logic (it was not considered how the trustee was either obliged or empowered by the will to pay money for the parent and second child), caused COMSOC to re-instate the mother's benefits. However, her benefits were still reduced to discount the child who was the beneficiary.

The issue of discretionary trust funds was brought to a head with the case of *Audrey Henson*,<sup>11</sup> a mentally handicapped woman who had been in receipt of an allowance under the *Act* as a single disabled person since 1955. When her father died in 1981, she became a beneficiary under the terms of his will, which left her \$82,000.00 in trust, subject to "the absolute and unfettered discretion" of the trustees over both the capital and income. *Henson* became a test case because there was an additional instruction to the trustees which expressly excluded any payments to Ms. Henson which would reduce or remove her family benefits allowance.

"The residue of my estate and the income therefrom shall not vest in my said daughter and the only interest she shall have therein shall be the payments actually made to her, or on her behalf, and received by her or for her benefit therefrom. 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 estate were not paid to her for her benefit ...*"<sup>12</sup> [my emphasis]

It was intended that the trustees would be able to supplement Audrey Henson's income, either by one annual cash payment or the purchase of necessities. This wording put the case on a collision course with COMSOC's policy to compel payments from trust funds wherever possible. It also raised the wider social policy issues of what level of impoverishment the state could impose on social assistance recipients and, secondarily, who should provide primary support for adult disabled persons as between parents and the state.<sup>13</sup>

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11. *Henson v. The Director, Income Maintenance Branch. Ministry of Community and Social Services* (10 December 1987), (Ont. Div. Ct.) [unreported].

12. *Ibid.* at 3.

13. For a full discussion of the policy issues involved see, E. Zweibel, "Private and Public Assistance: Discretionary Trusts for the Disabled Social Assistance Recipient" (1989) 32 E.T.R. 261.

In COMSOC's view, the Henson will challenged the state's right to set and control eligibility standards to ensure equal distribution of limited resources to those in need. On the other hand, Henson's parents wished to continue to supplement their daughter's low standard of living after their death; removal of the trust fund would lock their daughter into a lifetime of poverty. Benefits were cut off to Ms. Henson; that decision was appealed and, in 1985, the Social Assistance Review Board reversed the decision of the Director, reinstating Ms. Henson's benefits.<sup>14</sup> COMSOC appealed to the Ontario Divisional Court.

The specific legal battleground was drawn over the issue of "availability" of the trust assets, both income and capital. If the assets were available, Ms. Henson would be ineligible for family benefits until the assets were spent down to her maximum eligibility level of \$3,000.00. The case law at the time favoured the position of COMSOC. In *Re Goodwin*<sup>15</sup>, the Divisional Court upheld a 1979 decision of the Social Assistance Review Board, which assessed testamentary trust funds to be a "liquid asset", under the *Act*, even though the funds were held in the trustees' "absolute and uncontrolled discretion" to use "as (they) shall deem advisable for the maintenance and support of my son, Wayne Goodwin".<sup>16</sup>

Previously, in 1973, the Court of Appeal of Ontario, in *Re Fawcett*,<sup>17</sup> upheld a decision of the Divisional Court which ruled that funds paid into court under an award to a child under the *Fatal Accidents Act*,<sup>18</sup> and payable upon the child's attaining maturity, were also a "liquid asset" for the purposes of the *Family Benefits Act*.

Despite these prior decisions, the Divisional Court went the opposite way in *Henson*, deciding that the trust funds were not a "liquid asset". The court's reasoning was based on the "absolute and unfettered discretion of the trustees",<sup>19</sup> which prevented the Director from compelling the trustees to make payments to Ms. Henson. The major public policy issues which had been

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14. *Henson v. The Director, Income Maintenance Branch, Ministry of Community and Social Services*, (22 August 1985), (Social Assistance Review Board) [unreported].

15. (4 March 1980), (Ont. Div. Ct.) [unreported].

16. *Goodwin v. The Director, Income Maintenance Branch, Ministry of Community and Social Services*, (12 June 1978), (Social Assistance Review Board) [unreported].

17. *Re Fawcett and Board of Review* (1973), 1 O.R. (2d) 772 (C.A.)

18. R.S.O. 1970, c. 164.

19. *Supra*, note 11 at 3.

extensively addressed in the submissions of both parties, were peremptorily dismissed with the comment:

“This is not a case where the testator’s intention should be overridden on some grounds of public policy”<sup>20</sup>

The court was not prepared to interfere with the clear language of the will or to judicially subvert the plain meaning of “availability” under the *Regulation*:

“ ‘To override the testator’s intention’, in our view, would not only do violence to the will itself, but it would also do violence to what we conceive to be the plain language of the Regulation in issue.”<sup>21</sup>

COMSOC appealed this decision to the Court of Appeal. Meanwhile, several cases involving discretionary trusts were waiting in the wings, either at the pre-Social Assistance Review Board or the pre Divisional Court level. It was generally assumed (in retrospect, naively) that *Henson* would settle the issue of availability once and for all. After significant delay, (Audrey Henson had died in the interim), the Court of Appeal issued an anti-climatic decision in December, 1989, upholding the Divisional Court ruling, but providing no comment other than being in agreement “with the decision and reasons thereof of the Divisional Court”.<sup>22</sup>

Unfortunately, it cannot be reported that the “availability” issue was settled. Although it lost the general policy issue on the testator’s ability to override the perceived public interest, COMSOC continued to fight the bad fight on the narrower technical grounds of the testamentary language of each particular will. It sought to exploit the iron clad language of the Henson will by distinguishing it from the more standard will language found in most testamentary gifts which had not been drafted in contemplation of the family benefits issue. The *Henson* decision was not treated as binding and arguments evolved along the lines of whether the testamentary language had “more in common with *Henson* or with *Goodwin*”.<sup>23</sup>

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20. *Ibid.* at 5.

21. *Ibid.*

22. *Re Henson*, (22 September 1989), (Ont. C.A.). [unreported].

23. *McMillen v. The Director, Income Maintenance Branch, Ministry of Community and Social Services* (28 November 1988), (Social Assistance Review Board) [unreported].

The next decision to reach the Divisional Court was *Powell*<sup>24</sup> in December, 1989. Although the court appeared to disapprove of the strategy of comparing *Henson* to *Goodwin*, it did further COMSOC's strategy by reducing the issue to the technicality of the particular testamentary document:

"In my view it is not particularly helpful to consider whether the present case more closely resembles one or other decided cases [*Henson* or *Goodwin*]. What is required is to look at the precise language used in the will in the case then before the tribunal."<sup>25</sup>

In *Powell*, the trustee's discretion was different for the interest income, as opposed to the capital, instructing the trustee:

"To keep invested the residue of my Estate and to pay the net income derived therefrom to or for my son, Thomas James Powell, for his support, maintenance, medical attention and assistance as my Trustee in his uncontrolled discretion may decide, with power and authority to my said Trustee to pay to or for the benefit the my son, *such part or parts of the whole of the said capital* of the said residue of my Estate as he in his uncontrolled discretion considers advisable until my son dies."<sup>26</sup> [my emphasis]

Given that particular language, the court concluded that the net income was "available", for the purposes of the *Family Benefits Act* but that the capital was not. The distinction between the two powers lay in the use of the words "such part or parts of the whole of the said capital". The court determined that in regard to income, there was an obligation to pay the income to the son and the trustee's discretion was only to be exercised in distinguishing whether the money went for support, maintenance. In contrast, the magic of the expression "part or part of" meant that, in regard to the capital, the trustee could decide whether or not to pay out any of the capital.

The court's refusal to comment on the public policy issues in *Henson*, invited the results in *Powell*; the issues had been reduced to the legal technicalities of testamentary language. Even though the decision fragmented the possibility of a consistent approach to testamentary gifts, it at least appeared to have laid out clear language, by which testators could establish that trust assets were unavailable. However, COMSOC continued to resist judicial

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24. *Powell v. The Director, Income Maintenance Branch, Ministry of Community and Social Services* (22 December 1989), (Ont. Div. Ct.) [unreported].

25. *Ibid.* at 3.

26. *Ibid.* at 2.



guidelines and continued to contest testamentary language which came within the *Powell* guidelines.

A Divisional Court decision followed quickly on the heels of *Powell* which should have put the final nail in COMSOC's coffin on the availability issue. In *McMillen*, the Social Assistance Review Board had already overturned the decision of the Director, making a thorough and exhaustive analysis of the previous case law, before finding *Henson* should prevail where the testator was granted an "unfettered and uncontrolled"<sup>27</sup> discretion. The Board was careful to point out that specific language in the will, in regard to discretion, whether it was "uncontrolled" as in *McMillen* or "absolute and unfettered" was essentially irrelevant since they were "substantially identical terms".<sup>28</sup>

Unfortunately the Divisional Court's reasoning in *McMillen* is somewhat terse. It simply states that *Henson* governs on the particular facts and that the funds are not "available" with the caveat that there is "no evidence of bad faith or a refusal by the trustees to exercise their discretion".<sup>29</sup> This comment reflects the earlier general case law on discretionary trusts which placed a strict limit on the power of the court to intervene in the exercise of a trustee's discretion.<sup>30</sup> Certainly, from the point of view of evolving clear principles, this judicial obiter might well act as a red herring to confuse future decisions since no guidelines are laid down as to what constitutes a refusal to exercise discretion.

In May, 1991, the *Sandra Walker* case, previously referred to in this paper, was finally heard by the Divisional Court.<sup>31</sup> In *Walker*, the Director of Income Maintenance had reduced Mrs. Walker's family benefits on the basis that one of her daughters was not a dependent. The child, nine years of age, was a beneficiary of \$11,000 under the will of a family friend. The money was to be held in trust until the child reached age 18. After several delays, the Social Assistance Review Board upheld the Director's decision to reduce benefits.

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27. *Supra*, note 24.

28. *Ibid.* at 13.

29. *McMillen v. The Director, Income Maintenance Branch, Ministry of Community and Social Services*, (27 February 1990), (Ont. Div. Ct.) [unreported].

30. *Gisborne v. Gisborne* (1877), 2 A.C. 300 (H.L.); for a general discussion on the case law see Zweibel, *supra*, note 12.

31. *Walker v. the Director, Income Maintenance Branch, Ministry of Community and Social Services* (5 May 1991), (Ont. Div. Ct.) [unreported].

*Walker* differed from *Henson* and *Powell* in that the testator was a family friend and had no familial obligation to provide support for the child. Although the policy issue had already, theoretically been decided by *Henson*, there was the added policy consideration that dissipation of the asset for general support purposes would discourage any arms-length donor from assisting children of family benefits recipients.

The language used in the will was very simple. In regard to both the income and the capital, the trustee was empowered to:

“pay to or apply for the benefit of such child the whole or such part of the net income ... and such part or parts of the capital thereof as my Trustee in her uncontrolled discretion from time to time considers necessary or advisable.”<sup>32</sup>

In a brief decision, Justice Montgomery followed the logic of *Powell*; emphasizing the precise language of the will, he found both the capital and income were “beyond the reach of the Appellant”, and impliedly, unavailable. He went on, fortunately to lay down a general principle, which, if respected by COMSOC, would go a long way toward resolving the issue. In quite succinct terms, the court stipulated that:

“where an unfettered discretion exists in a Trustee the funds are not available under the *Family Benefits Act*.”<sup>33</sup>

## CONCLUSION

The courts have not directly embraced the policy issues involved in the discretionary trust controversy and their solution of determining the matter by way of the testator’s intention, as interpreted in the language of the will, appears both narrow and somewhat arbitrary. However, at this point, an answer has been given to the central question in dispute. Trust assets, when held within the uncontrolled discretion of the trustee, will not disqualify a recipient of family benefits. Obviously, the amount of money actually paid out by the trustee must remain within the permissible income and asset levels.

Lawyers can, now, with some confidence, predict the legal effect of current testamentary grants and, more importantly, can help clients make beneficial gifts to social assistance recipients by using the appropriate language of uncontrolled discretion; the testamentary language used in *Henson* is recom-

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32. *Supra*, note 9.

33. *Supra*, note 31.

mended. Although the main battle appears to have been won, some legal skirmishes continue, namely:

- (a) the status of irrevocable trust assets where the social recipient is both the grantor and the beneficiary;<sup>34</sup>
- (b) the status of payments made by the trustee to a recipient in need during the course of litigation; and
- (c) the possibility that COMSOC can force the beneficiary to begin a Surrogate Court action against the trustee to compel payments by requiring that the recipient make “reasonable efforts” to obtain support.

The matter will not be fully settled until COMSOC accepts the court’s conclusion that trust funds do not in themselves disqualify social assistance recipients. COMSOC can still maintain appropriate controls on trust funds by way of fair and flexible income levels. To date, COMSOC appears to find this small kernel of wisdom indigestible. Pity.

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34. *Homan v. The Director, Income Maintenance Branch, Ministry of Community and Social Services* (9 November 1990), (Ont. Div. Ct.) [unreported]. The court found that funds put into trust by a social assistance recipient, where she was also the beneficiary, were unavailable for the purposes of the *Family Benefits Act*. COMSOC has appealed this decision to the Court of Appeal.