

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision of February 14, 2013 in which the ministry determined that the appellant, as a person with disabilities, had assets exceeding the asset limit in s.10(2)(a) of the Employment and Assistance for Persons with Disabilities Regulation and that he was therefore no longer eligible for disability assistance. The ministry decided that the appellant's trust was not a valid trust under s.10(1)(y) of the regulation and was therefore not exempted from the asset limit by s.12(2) of the regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) s. 10(1)(y), s. 10(2)(a), and s. 12(2)

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant is designated as a person with disabilities (PWD) under the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). He has been a recipient of disability assistance (or similar assistance under previous legislation) for over 35 years.
- In March 2011 the appellant's mother passed away and bequeathed to the appellant a portion of her estate. Shortly thereafter, the appellant retained a lawyer to assist in creating and settling a trust dated for reference August 3, 2011 (the Trust). The appellant's inheritance of approximately \$63,000 was deposited into the Trust.
- After receiving a copy of the Trust in September, 2012 the ministry advised the appellant on November 27, 2012 that he was no longer eligible for disability assistance. The ministry had determined that the Trust was not valid, so accordingly the funds in the Trust were assessed as being the appellant's asset, thus putting him over the eligible asset level of \$5,000 for a single recipient of disability assistance.
- Under the terms of the Trust the appellant is the settlor, the initial trustee, and the life beneficiary. After his death, the remainder of the Trust (if any) will form part of his estate and be subject to such terms and conditions as he may appoint in his will, provided that the power of appointment may not be exercised in favour of himself. If the appellant dies without a will, the Trust provides that any remaining funds will be distributed pursuant to intestate legislative provisions. The Trust also provides that the appellant (as trustee) need not maintain an even hand in considering the interests of all beneficiaries. The specified purposes for which the trustee may pay out funds from the Trust substantially reflect the definition of "disability-related cost" set out in s. 12(1) of the EAPWDR.

On reconsideration the ministry confirmed its denial of disability assistance on the basis of the appellant having assets in excess of the allowable limit.

At the appeal hearing the appellant, through counsel, reiterated the submissions he had made at reconsideration and submitted no new evidence.

The ministry brought to hearing a single copy of a document consisting substantially of written argument and sought to introduce it to the panel. The panel invited the ministry to make such oral submissions as it deemed appropriate from the document. The appellant, through counsel, objected to acceptance of the document on the basis that he had sought from the ministry for some time an explanation as to the legal basis for the ministry's decision on the validity of the Trust, and had not been provided with any information. The appellant argued that it would be prejudicial to accept the ministry's written submission.

Section 5.2(g) of the tribunal's Practices and Procedures specifies that a party wishing to provide the tribunal with additional documentation not included in the appeal package should provide it to the tribunal at least three business days before the hearing date. If that is not possible, the party may bring sufficient copies of the additional documentation to the appeal hearing for distribution to panel members and the other party. In consideration of this provision of the Practices and Procedures, the

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lateness of the submission, the fact that there was only one copy, and the fact that the ministry was given full opportunity to make any oral submissions it deemed appropriate, the panel decided not to accept the ministry's written submission.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry reasonably determined that the appellant, as a person with disabilities, had assets exceeding the \$5,000 asset limit in s.10(2)(a) of the Employment and Assistance for Persons with Disabilities Regulation and that he was therefore no longer eligible for disability assistance. In particular, the ministry had decided that the appellant's Trust was not a valid trust under s.10 (1)(y) of the regulation and was therefore not exempted from the asset limit by s.12(2) of the regulation.

The relevant legislation is as follows:

EAPWDR

Asset limits

10 (1) The following assets are exempt for the purposes of subsection (2):...

- (y) assets exempted under section 11 (2) [*asset development accounts*] or 12 (2) [*assets held in trust for person with disabilities*]; ...

(2) A family unit is not eligible for disability assistance if any of the following apply:

- (a) a sole applicant or recipient has no dependent children and has assets with a total value of more than \$5 000;...

Assets held in trust for person with disabilities

12 (1) In this section, "**disability-related cost**" means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

- (a) devices, or medical aids, related to improving the person's health or well-being,
- (b) caregiver services or other services related to the person's disability,
- (c) education or training,
- (d) any other item or service the minister considers necessary to promote the person's independence, and
- (e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,
 - (i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and
 - (ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to \$200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows:

- (a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus
- (b) any capital subsequently contributed to a trust referred to in paragraph (a),

is exempt for the purposes of section 10 (2) [*asset limits*].

(3) If the minister is satisfied that, because of special circumstances, the lifetime disability-related costs of a person referred to in subsection (2) will amount to more than \$100 000, the minister may authorize a higher limit for the person for the purposes of subsection (2).

(4) A person referred to in subsection (2) who has a beneficial interest in one or more trusts must keep records of the following and make the records available for inspection at the request of the minister:

- (a) for a trust created before April 26, 1996, the capital of the trust on that date;
- (b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created;
- (c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b);
- (d) all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person has a beneficial interest...

The Parties' Positions

The appellant's position is that the ministry made its decision without reference to the correct interpretation of the law of trusts. The appellant says that the ministry does not appreciate that there is a valid trust where one individual is the settlor, the trustee, and a beneficiary of the trust. The appellant cites Waters' Law of Trusts in Canada (Waters) as authority for his position. He says that the "three certainties" exist – certainty of intention to create a trust, certainty of the subject matter of the trust, and certainty of the objects of the trust (i.e. the beneficiaries.) The appellant argues that according to the criteria identified in Waters, the Trust is validly constituted and is not a sham trust since there is no element of deceit. Finally, the appellant argues that the ministry has ignored s. 12 of the EAPWDR which expressly allows a person to create a trust and transfer assets to it so as to maintain eligibility for receiving disability assistance.

The ministry's position is that a trust is a relationship whereby property is held by one party for the benefit of another. The ministry argues that the Trust is not a valid trust because the appellant is the sole trustee and beneficiary of the trust, and that there are no other beneficial interests in the Trust. The remainder is dealt with in the same way as if the appellant owned the property. The ministry says there is essentially no difference between this arrangement and simple ownership, so it cannot find any intention to create a trust. The ministry acknowledged that it is not concerned that under the annual expenditure limits specified in s. 7(2.1) of Schedule B of the EAPWDR, the funds in the Trust may be exhausted during the appellant's lifetime. However, in the ministry's view, the appellant effectively retains the entire legal and equitable ownership of the Trust funds and therefore the Trust is not valid.

Panel Decision

In the panel's view the ministry was not reasonable in deciding that the Trust is not a valid trust as contemplated by EAPWDR ss. 10(1)(y) and 12. The term "trust" is not defined in the legislation, so the determination of whether the Trust satisfies the legislative criteria depends on the common law of trusts and any discernible legislative intention.

The panel concludes that the Trust demonstrates the three certainties required at common law. The appellant's intention to create a trust is demonstrable from the language of the Trust document with its stated intention to maintain eligibility for disability assistance, and the appellant's creation of a separate bank account to hold the Trust funds. The subject matter – the \$10.00 initial settlement

identified in Schedule "A" of the Trust document – is certain. To the initial settlement was subsequently added the appellant's inheritance, as permitted by the terms of the Trust. The beneficiaries other than the appellant - either his testamentary and/or intestate heirs – may or may not be individually ascertainable at this time but the mechanism for ascertaining them – either from the appellant's will or from the law of intestacy – is certain.

The ministry argues that because the appellant is the sole settlor, trustee and beneficiary he effectively retains both legal and beneficial ownership of the funds held by the Trust. However, the law is clear that a settlor can be a sole trustee, and that a beneficiary can also be a trustee. As discussed above, the Trust makes provision for other beneficiaries to have an interest in the Trust either through the appellant's will or through intestacy legislation. Accordingly, the ministry's assertion that there are no other beneficial interests in the Trust is not supported by the language of the Trust.

The ministry acknowledges that so long as trust funds are expended in accordance with the legislative conditions, it is acceptable that all of the funds in a valid trust may be exhausted during the life beneficiary's lifetime, leaving nothing for the other beneficiaries. Even if the Trust could be wound up in the future so as to give the appellant the entire legal and equitable ownership, that does not invalidate it at common law.

While the panel acknowledges the ministry's arguments with respect to the invalidity of the Trust, based on the foregoing analysis the panel concludes that the Trust is valid at common law, and accordingly is a trust as contemplated by EAPWDR ss. 10(1)(y) and 12. The panel can discern no express or implied legislative intent to exclude or otherwise invalidate this type of trust. The Trust is subject to the limitations imposed by the legislation – EAPWDR s. 12 - with respect to disability-related costs, annual limits on expenditures, and reporting requirements. The amount of funds in the Trust falls within the \$200,000 limit set out in EARWDR s. 12(2).

Based on the foregoing analysis, the panel concludes that the ministry's reconsideration decision is not a reasonable application of the legislation in the circumstances of the appellant, and accordingly rescinds that decision in favour of the appellant.