

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated April 26, 2018 which found that the Appellant is not eligible for disability assistance because he has assets valued at more than the allowable limit, pursuant to Sections 10(2) and 12(2) of the *Employment and Assistance for Persons With Disabilities Regulation*.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Sections 1, 10(2) and 12(2)

PART E – SUMMARY OF FACTS

The Appellant is a sole recipient of disability assistance as a designated Persons with Disabilities (PWD).

The evidence before the ministry at the time of the reconsideration decision included:

1. Letter from the Ministry to the Appellant dated January 22, 2018 (Letter #1) advising the Appellant of the Ministry's original decision regarding the trust arrangement. Letter #1 states, in part, that while the Ministry has determined that the trust is discretionary, because the Appellant has the power to amend the trust terms, he could change this by making his estate the beneficiary, in which case he would be in a position to collapse the trust and compel the trustees to pay the trust to him.
2. Request for Reconsideration (RFR) submitted February 22, 2018 (dated February 21, 2018) in which the Appellant stated that he had "executed an amendment to his trust, effective February 7, 2018", a notarized copy of which was attached to the RFR and had also been emailed to the Ministry. He added the comment "This amendment should satisfy Ministry requirements for a discretionary trust";
3. Copy of the original "Trust Settlement" (Trust Settlement) dated October 23, 2017, signed by the Appellant (referred to in the Trust Settlement as the "Settlor" and the "Original Beneficiary");
4. Letter from a law firm to the Ministry, dated November 6, 2017 and signed by the Trustee acting as a solicitor for the law firm, appending the Trust Settlement, confirming the value and composition of the trust property, and asking that the Ministry confirm that the Appellant's benefits will not be adversely affected pending approval of the trust;
5. Follow-up letter from the sender of the November 6, 2017 letter to the Ministry, dated December 5, 2017, where the same sender asked whether the Ministry has had an opportunity to review the Trust Settlement and to confirm that the Appellant's benefits will not be adversely affected;
6. Copy of a one page amendment to the Trust Settlement (Deed of Amendment) dated February 7, 2018 under cover of a one page Notarial Certificate dated February 7, 2018 certifying and attesting that the Deed of Amendment is a true copy of the original document; and
7. One page Ministry document titled "Trust Query Cover", dated November 29, 2017 identifying the Appellant as the recipient/applicant, and confirming that the Appellant has been designated as a person with disabilities (PWD) who is not a resident within a special care facility, and identifying the current value of the Trust Property at \$370,906.61.

Additional information

In his Notice of Appeal dated May 14, 2018, the Appellant stated as his "Reasons for Appeal" that, under the terms of the amended trust (the Trust Settlement and the Deed of Amendment, considered together) "... only the trustee can wind up the trust and appoint trustees. [The Appellant] is entitled to the trust funds if the trust is wound up during his lifetime but only as the Original Beneficiary, and he cannot appoint himself as a trustee. While he has the power to amend the terms of the trust clause 5.10, [the Applicant] cannot amend the provisions for appointment of trustees or name himself as a beneficiary under section 1.2. The trust fund cannot, therefore, be considered an asset of [the Applicant]."

After the reconsideration decision was made but prior to the hearing before this Panel, the Ministry provided a letter from the Ministry to the Appellant dated April 26 (Letter #2) indicating that the Ministry had completed its reconsideration decision and offering to arrange a meeting between the Appellant's legal counsel and the Ministry's legal counsel to discuss the law trust issues pertaining to the Appellant's file.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and “oral and written testimony in support of the information and records” before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant based on information available to the Ministry on the date that it made its reconsideration decision.

The Panel considered the information contained in the NOA to be argument.

Oral Evidence Presented at the Hearing

At the hearing, the Appellant was joined by a representative: the Trustee, who also served as the Appellant’s legal counsel and advocate at the hearing (the Advocate). He was also supported by a family member and his caregiver who only observed. The Ministry asked to have a Ministry observer attend for training purposes and the Appellant did not object to the observer attending.

At the hearing, the Advocate spoke on behalf of the Appellant, provided a summary of the terms of the Trust Settlement and Deed of Amendment, emphasizing that:

- The Appellant is the sole beneficiary of the trust in his lifetime and the Advocate is the Trustee;
- The section of the Trust Settlement under which the purpose of the trust is described, and which cannot be amended, states that the Trustee shall hold the trust fund and decide how capital and income might be spent, which makes it a discretionary trust;
- The Appellant has no control over the Trustee’s ability to exercise her discretion and nothing in the Trust Settlement, as amended, gives the Appellant the authority to tell the Trustee what to do; and
- The provisions of the Trust Settlement and the Deed of Amendment ensure that the Appellant can at no time be appointed as a sole trustee.

The Advocate also argued that discretionary trusts are not considered assets by the Ministry for the purpose of Sections 10 and 12 of the EAPWDR and that it is non-discretionary trusts that are subject to the \$200,000 asset limit set out in Section 12 of the EAPWDR. The Advocate stated that the Ministry had acknowledged that the trust was discretionary in Letter #1, but expressed the concern that the Appellant could compel the Trustee to collapse the trust and pay the proceeds to the Appellant’s estate. She asserted that this concern had been fixed by the Deed of Amendment which prevents any amendment to the section of the Trust Settlement that specifically excludes nomination of any of the following as beneficiaries: “the Settlor or the Settlor’s creditors, estate or creditors of the Settlor’s estate” (the Settlor being the Appellant). The Advocate stated that, as this was the only issue identified by the Ministry in Letter #1, it was the Appellant’s view that the Ministry’s concern that the Appellant could appoint his estate as a beneficiary had been addressed. However, the revised trust terms were also rejected by the Ministry in the Ministry reconsideration of April 26, 2018.

The Advocate indicated that the Appellant really wants the trust to meet the requirements for being recognized as an excluded asset under the EAPWDR, but this is frustrated because the Ministry has not identified what other provisions of the Trust Settlement, as amended, are problematic. The Advocate stated that if the Panel finds in favour of the Ministry, she hopes that the Ministry will explain to the Appellant's legal counsel what the problem is. She said that she hopes that the Ministry will not say that it will only accept an agreement that cannot be amended in any way as there might be future legislative changes that need to be reflected in the Trust Settlement, or changes in the Appellant's circumstances which might result in the need to change the beneficiaries. She said that if legal counsel for the Appellant knows which provisions of the trust settlement are a problem, they will be amended.

At the hearing, the Ministry stated that its decision and reconsideration decisions relating to trust assets generally are different from other decisions made by the Ministry in relation to the *Employment and Assistance for Persons with Disabilities Act* and Regulation in that decisions are not made by "staff in the field" but were rather made by lawyers specializing in trust law. The Ministry confirmed that the reconsideration decision was made after the Deed of Amendment had been executed and reviewed by the Ministry's legal counsel and that the reconsideration decision took into account the terms of the Deed of Amendment.

The Ministry stated that it was not in a position to provide details of the legal opinion provided by its legal counsel as to why the Ministry was still not in a position to recognize the trust fund as an exempt asset for the purpose of Sections 10 and 12 of the EAPWDR due to "lawyer/client privilege". The Ministry also said that "front-line staff" in the Ministry had no discretion to overrule a decision provided by legal counsel, but that there was no limit to the number of times that the terms of a trust fund could be amended, so the Appellant could further modify the Trust Settlement and submit it to the Ministry again for review.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's decision, which found that the Appellant is not eligible for disability assistance as a result of having assets valued at more than the allowable limit, pursuant to Sections 10 and 12 of the EAPWDR, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the Appellant.

The relevant legislation is as follows:

Employment and Assistance for Persons With Disabilities Regulation

Asset limits

- 10** (1) The following assets are exempt for the purposes of subsection (2): ...
- ... (y) assets exempted under ...
 - (ii) section 12 (2) [*assets held in trust for person with disabilities*] ...
- (2) A family unit is not eligible for disability assistance if the family unit has assets with a total value of more than the following:
- (a) in the case of a family unit that includes one applicant or recipient who is designated as a person with disabilities, ... \$100 000 ...
- 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 that promotes 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 \$200 000, 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 Ministry's position is that the terms of the Trust Settlement, as amended, render it a collapsible discretionary trust in which the Appellant can compel the trustee to pay the trust property to the Appellant and therefore the trust fund is not an exempt asset under Sections 10 and 12 of the EAPWDR. As the value of the trust fund exceeds \$200,000 and the current value of the asset in excess of \$200,000 exceeds the Appellant's \$100,000 asset limit, the Appellant is ineligible for disability assistance.

The Appellant's position is that, despite changes that were made to the Trust Settlement to meet the Ministry's requirements as expressed in Letter #1, the Ministry was still not prepared to recognize the trust fund as a discretionary trust and therefore an exempt asset under Sections 10 and 12 of the EAPWDR, and further that the Ministry did not give adequate reasons to indicate what provisions of the Trust Settlement were at issue and understood so that the Trust Settlement could be further amended to satisfy the Ministry's requirements.

The Panel's Decision

Section 10 of the EAPWDR states that assets held in trust for a family unit comprising a sole PWD recipient are exempt up to a value of \$100,000, unless, under the provisions of Section 12 of the EAPWDR, a PWD is incurring prescribed "disability-related costs" and keeps records of income and capital comprising any trust in which he or she has a beneficial interest, in which case trust assets are generally exempt up to \$200,000 of the value of assets held in trust. Under Ministry policy, the Ministry does not generally consider a trust in which the trustee has absolute authority over payment of capital and income from the trust to be an asset, provided the beneficiary has no legal right to collapse the trust and gain control of the assets.

In its reconsideration decision, the Ministry stated as its reasons to the Applicant that "Upon review of the February 2018 amendment, the ministry has determined that your trust remains a collapsible trust in which you can compel the trustees to pay the trust property to you." However, the reconsideration decision does not explain how or why the Ministry reached this conclusion. As such, the Panel is unable to determine whether or not the decision was reasonable. The Panel notes that the test for the adequacy of reasons in a reconsideration decision is whether the reasons as presented by the Ministry in the reconsideration decision allow the reader to understand why the Ministry made its decision, and thereby

permit the Panel to determine whether the decision is within the range of reasonable conclusions. As a result of that inadequacy, this Panel is in no position to decide whether the Ministry's decision was reasonably supported by the evidence or a reasonable application of the enactments, in the circumstances, based on information available to the Ministry on the date of the reconsideration decision. Given the inadequate reasons, and given that the Panel is not to engage in unfounded speculation, the Panel finds that the Ministry's reconsideration decision was not reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the Appellant, as required under Section 24(1) of the *Employment and Assistance Act*.

Had the Panel not found on this basis, it is also of the view that, if an assessment and decision is made by legal counsel to the Ministry and a reconsideration adjudicator is bound by that decision, such a decision bears the hallmarks of an improper delegation of authority and a fettering of discretion. The Panel finds that it need not make a determination on that point.

Conclusion

The Panel finds that the Ministry's decision that the Appellant is not eligible for disability assistance because he has assets valued at more than the allowable limit, pursuant to Sections 10(2) and 12(2) of the EAPWDR, was not reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the Appellant. Therefore the Ministry's decision is rescinded. The Appellant is successful in his appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:*Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/06/07

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/06/07

PRINT NAME

Carl Gorham

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/06/07