

# Canada's pope of Henson trusts

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For Law Times

**G**oogle "Henson trust" and Ottawa trusts and estates lawyer Ken Pope's web site is right up there.

The 54-year-old sole practitioner has become an expert on the absolute discretionary trusts that emerged from the 1989 Ontario Court of Appeal decision *Ontario (Minister of Community and Social Services) v. Henson*.

The court upheld a 1987 Divisional Court decision that turned down the Ontario government's attempt to deny social assistance to Audrey Henson despite a provision her father, Leonard, made in his will to transfer his estate to three trustees to be held on his severely disabled daughter's behalf.

Ontario's appellate court agreed that estate assets placed in a specific way in the care and control of a trustee to be administered on behalf of a beneficiary are not the beneficiary's assets and should not affect provincial benefits.

In these absolute discretionary, or *Henson*, trusts, trustees have the power to distribute — and withhold — the trust's income and capital as they see fit. Trusts can either be testamentary and taxed at graduated rates, or take the form of an *inter vivos* trust, and be taxed at top income tax rates at every dollar of income.

(A preferred beneficiary election, available when the beneficiary is severely disabled, allows for a joint election by the trust and preferred beneficiary to benefit from personal tax rates.)

Pope says while his clients seem to know about *Henson* trusts, many colleagues do not.

"One time in three, a client with a disabled dependent will go to a lawyer and get a Henson trust established as part of a will," he explains.

"But the other two times, it's either flawed or is just a trust for a child with a disability, which is even worse because such a trust normally states that the trustee is required to feed and house that child."

Pope says that people are going to lawyers who don't spend enough time focusing on estate planning and just "crank out simple wills because they think their clients want cheap, simple wills."

"That misses a lot of estate-planning opportunities that are very substantial and also misses the serious issue of children with disabilities who lose their benefits because lawyers didn't ask their clients if they have children with special needs who should have a *Henson* trust."

Pope says part of the problem is that a lawyer's secretary, and not the lawyer, often prepares wills in a standard format.

"Generally, the clientele has been led to believe by lawyers that lawyers know everything and clients figure if this is what the lawyer has given them, that's what they should have."

He says not a week goes by

when he's not dealing with someone who has received bad legal advice about *Henson* trusts.

In those situations, Pope steps in and does a "fix" to correct the absence of or problem with the *Henson* trust in a will.

For instance, with one case in Brantford, Ont., a judge in Hamilton agreed to vary a will to include a Henson trust.

"There was no trust in the original will prepared by a since-retired lawyer in Simcoe, whose partners are still practising and were on the hook for it," explains Pope.

"The executors" for the deceased woman said she thought she had a *Henson* trust when in fact there wasn't one."

Pope says part of the problem is lawyers who went to law school before the early '90s wouldn't have been taught about *Henson* trusts.

And he says that while the Ontario Ministry of Community and Social Services rewrote the policies and procedures of the Ontario Disability Support



Many lawyers aren't aware of *Henson* trusts, says Ottawa lawyer Ken Pope.

Program (ODSP) in 1993 to incorporate *Henson*, program staff rarely inform clients about this provision.

Indeed, Pope himself may not have become an expert in *Henson* trusts had he not stumbled onto them while preparing for a lecture to the Ottawa chapter of

the Schizophrenia Society of Canada.

"I looked into the statistics and discovered that in most cities in Ontario, more than one family in 10 has either a child or sibling with a disability receiving ODSP and these people had no way of finding someone with expertise to assist them with estate planning," he explains.

So Pope focused his legal practice to help families establish a *Henson* trust to ensure children with a disability are not penalized for their inheritance. Often they are, as he noted.

Anyone receiving ODSP benefits cannot own more than \$5,000 in liquid assets.

However, an absolute discretionary, or *Henson*, trust is worded in such a way that a child with a disability is not considered to have personally received an inheritance since the trust states that the funds are not in the name of the child.

"Unlike in a normal trust,

the child has no control over and no ownership of the assets," Pope explains.

As a result, the ODSP benefits continue and the designated trustee can pay out the trust assets for the benefit of the child at the trustee's "absolute and unfettered" discretion.

Yet unless a lawyer recommends a *Henson* trust, Pope says he often sees clients who opt for a disability expenses trust, which in Ontario only allows a child to inherit up to \$100,000 without penalty and stipulates that the funds can only be used for expenses directly related to the child's disability, such as medical care or a wheelchair.

Or parents choose to designate multiple beneficiaries and then appoint a trustee who will dispense all of the money to the child with disabilities.

But that type of trust is subject to an annual review and the bulk amount of the trust will result in the disabled child being disqualified to receive ODSP benefits, says Pope. ■