

What will happen when I'm gone? Planning the care of loved ones with mental illness

By Peggy Thompson

No matter how old they get, your kids are still your kids. But, when they're adults with mental illness, you worry all the time, particularly as you yourself age.

Will he have a happy, secure life after I'm gone? Where will she live? Who will look out for his best interests? Will finances be adequate to take care of her? Who will take him to his favorite activities; expose him to new ones?

If love is immeasurable, then your cup surely runneth over when planning for the future of a loved one who is mentally ill.

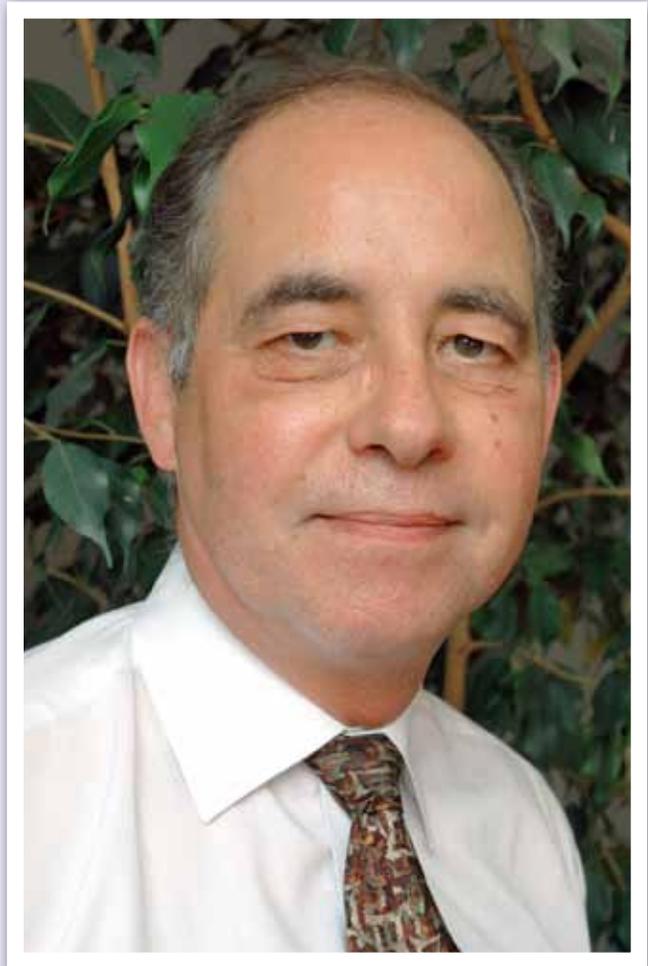
Ken Pope, LLB, TEP, and Henson Trust expert does not have a loved one with a disability. But, through his law practice, he understands that taking care of a child with a disability can be an enormous emotional responsibility, especially if there are concerns about the child's long-term financial security. He considers it a privilege to act on behalf of his client families and has contributed a chapter to *T.A.S.K. The Trusted Advisor's Survival Kit* (LexisNexis, 2009), a book that covers Henson Trusts, disability and caregiver tax credits, back filings, RDSPs (Registered Disability Savings Plan), ODSP (Ontario Disability Support Program) issues, guardianship to a limited extent, competence, powers of attorney, and various other issues.

Pope is also a public speaker, educating lawyers and financial planners on how to best serve parents of special needs children.

"Most are not very well-advised on this subject," Pope says, admitting the scarcity of knowledge on the subject both surprises and dismays him.

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While speaking to the Ottawa Chapter of the Schizophrenia Society of Ontario in 1996, he discovered that 99 percent of his audience was not aware of the



Ken Pope understands the emotional and financial responsibility caregivers face.

resources available to them, Henson Trusts included.

"It's similar to how only 50 percent of the population has

a will. People often don't foresee the consequences of not planning properly. Many parents are unaware of what they might gain by seeking out specialized help—or what they stand to lose if they don't."

According to Pope, the most complex matter is ensuring that the money you, as a parent, leave behind won't interfere with your child's government benefits. All Canadians with disabilities are entitled to support payments from

the government. The trouble is, by law, a person with a disability must be deemed to be living in poverty in order to qualify for support—a person receiving benefits cannot own more than \$5,000 in liquid assets. Therefore, if a parent plans to leave a substantial sum of money to a child by bequest, the inheritance could disqualify the child from receiving government benefits.

“Special arrangements are necessary to properly ensure that loved ones will be given the extra care they deserve, and that inheritances will not be wasted.”

In Pope’s words, the government says, “‘Oh, you inherited \$150,000? Well, when it’s all gone, come back and talk to us!’ The challenge for you, therefore, is to devise a way to leave money to your child without diminishing—and possibly eliminating—government benefits.”

Be absolutely sure of your options

Pope believes that the best course of action for parents is an Absolute Discretionary Trust. Known across Canada as the Henson Trust, it was named after Leonard Henson, a Guelph, Ontario parent attempting to provide for his special needs daughter.

Your child has no control over, and no ownership of, the assets of a Henson Trust. If the child is considered not to own the assets, then he or she can continue to receive full government benefits. Meanwhile, the designated trustee can pay out the trust assets for the benefit of the child at his or her discretion. There is no limit on how much can be left to the trust by the will, or insurance proceeds.

“An Absolute Discretionary Henson Trust is the most effective way for parents to ensure a child is properly cared for after their death. The child has no vested beneficial interest in this trust (it is legally not his, which means that the court cannot make the trustee give him the asset). Pope points out that a common terminal flaw is the omission of the non-vesting clause, for example, “No share of the income or capital thereof shall vest in my said son, and the only interest he shall have shall be in the amounts paid to or for his benefit.”

Pope says the omission of this clause is the most common error on the part of lawyers who don’t really understand. “If the parents review the will and see absolute they won’t realize the other clause is lacking. If someone thinks they have a Henson trust the simplest way to check is to fax me the will for review.”

Another option not currently available (but soon could be) is the Lifetime Benefit Trust (LBT). Drafted to protect registered retirement savings and/or registered retirement income funds from being eaten up by taxes at the time of your death, an LBT was last cited in Bill C-10 but died on the Order Paper when Parliament was prorogued in December, 2008. “Hopefully, we will see this new type of trust re-emerge and eventually see the light of law,” Pope says. “It is a true trust where the trustee(s) have absolute discretion on the amounts paid out to the disabled beneficiary. Absolute trustee discretion can provide much-needed assistance, especially when the beneficiary suffers from a mental disability that affects their ability to manage money. All too often, we have seen the best laid plans go astray when large sums of money are received by someone who does not possess the same abilities as those of the prudent trustee and before you know it, funds are spent and scattered in the wind, leaving little, if anything, to show of the inheritance.”

While it remains to be seen when the LBT will become law, Pope advises parents to watch Revenue Canada’s interpretation of any LBT-type vehicle that applies the proposed legislation to otherwise valid wills containing LBT provisions governing the RRSP/RRIF proceeds after death to the qualifying beneficiary.

“In that case, life insurance is an effective alternative. As with an accumulated sum of money, an insurance policy can be paid into an Absolute Discretionary Trust for the child. If you do not have enough money, look for someone who knows the child well and is a good manager of assets.”

Overwhelmed?

A dedicated volunteer in his own community, Pope, in an effort to be “socially useful,” expands his reach to all Canadians through long-distance counsel and allows parents who are struggling financially to compensate for services through time-payments. Additionally, he offers complimentary webcasts and links on his website www.kpopelaw.ca.

“Special arrangements are necessary to properly ensure that loved ones will be given the extra care they deserve, and that inheritances will not be wasted. Specialized legal counsel is necessary to ensure that the drafting of wills follows the court-tested arrangements required, and to continually consider any changes in provincial regulations and new case law.”

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