CHAPTER 54

PLANNING FOR CLIENTS AND FAMILIES WITH SPECIAL NEEDS

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Overview

This chapter will show you how to advise and assist families with family members with disabilities and special needs. It explores the issues that accountants and financial advisors will need to discuss with your families or with friends of special needs individuals with disabilities. In order to maximize available benefits and to plan for lifelong care, especially after the parents have passed on, specific planning tools such as Henson Trusts are needed. Insurance funding for trusts is a standard part of the estate plan. Disability-related tax credits must be put in place, the recently rolled out Registered Disability Savings Plans (RDSPs) must be considered and Lifetime Benefit Trusts to receive RRSPs and RRIFs on a tax-free basis must be anticipated.

This chapter will show you how to make sure that your clients have peace of mind about their estate arrangements to provide for children with disabilities, how to recapture between $5,000 and $20,000 of their tax dollars and how to reduce or remove taxation on RRSPs and RRIFs on death.

At a very conservative minimum, one Canadian family household in eight is either the parent or the sibling household of a person with severe disabilities who receives provincial disability benefits. In Ontario alone there are more than 500,000 households who fall into this statistic.

This does not include all of the people with disabilities who do not receive provincial supports, such as those receiving financial and other supports from workplace disability pensions, personal injury structured settlements and Canada Pension Plan disability benefits.

Any professional advisor who has not identified this core concern for those families has failed the “know your client” test; they have also lost the opportunity to assist these families in the course of their practice, which is a lost business opportunity.

Learning Objectives

By the end of this chapter, you will be able to:

- familiarize yourself with estate planning options for clients whether they have their own special needs or, more commonly, are the family, friend or guardian of someone with special needs;
- understand how the focus of estate planning shifts when planning for disability-related needs;
- maintain focus on how disability-related needs are protected by specialized trust, tax and succession planning tools and techniques; and
- know what to say and start the planning process when your client says, "I just want to live 60 seconds longer than my daughter who has disabilities."

KNOW YOUR CLIENT'S SPECIAL NEEDS

While the "know your client" issue is very important for all your clients, those who need to include special needs planning require even more careful financial planning given the inherently high costs associated with disabilities. Do you think that this will not affect many of your clients? Well, think again. While degrees of disability may vary substantially from client to client, keep in mind that many disabilities are not visible to the naked eye; if you do not ask the questions, you may not truly get to know your client. In addition to this, note that disability rates rapidly increase with age,[1] and with a large segment of the population at or approaching retirement, most advisors and accountants will represent either people with disabilities or someone who cares for a person with disabilities, whether or not they are aware of the fact.

Clearly understanding client core concerns will necessarily shift your focus from simple investment and retirement matters to facing the complex interaction between disability financial assistance programs, benefits and a range of tax and trust implications.

If the person with the disability is your client, then depending on the disability, your ability to communicate with your client may require

[1] 2006 Participation and Activity Limitation Survey: Disability in Canada, online: Statistics Canada <http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89-628-XIE &lang=eng#formatdisp>.

means such as electronic devices or alternatives to speech where applicable. We become so used to communicating with words that we forget that many persons with severe speech or language impairments may rely on, for example, facial expressions, gesticulations, symbols, flashcards, sign language, finger-spelling or button-pushing to get their message across.

If your client has limited mobility, consider arranging home visits rather than having the client come to your office. Some financial advisors regularly visit clients at home or in a nursing home because it affords them, firsthand, the opportunity to see how they live and to familiarize themselves with their clients' daily challenges. You may notice that it is often easier to get to know someone when they feel comfortable in their own surroundings. Because we live in a world that is not geared for people with special needs, do your best to make yourself and/or your business accessible.

Always remember that with disabilities come higher anticipated living costs, so there will often be a need for more prudent investment planning. You will need to safeguard capital to a large extent and to assist with paying for disability-related items and the often high costs of care/assistance, sometimes both future and ongoing.

How much personal health information should I ask? Keep in mind that some clients will be more than happy to give you plenty of disability-related information, while others will be very short in their answers. Help your client to understand that the more informed you are, the better able you will be, as a financial professional, to build a realistic investment plan, taking into consideration the pragmatic planning of disability-related costs — some obvious and many unapparent.

Some clients may not be willing to offer much detail, while others will be impressed to see that you, as their financial advisor or accountant, are taking a truly personalized approach to their financial planning. Doing so can build trust between you and your client, and can in turn make matters like thorough disclosure that much more likely, hence affording you a clearer picture of available assets.

Do not hesitate to take the "know your client" exercise to a much more detailed level when dealing with clients with special needs, or those who care for a special needs person. The extra time you take at this stage will help you gain insight into your client's financial expectations. You may even wish to draft a new "know your client" form specifically drafted to capture all of the relevant disability-related information and costs.

Across Canada, the huge number of families who have children with disabilities is astounding, and constitutes a segment of the population that is both large and identifiable — as professionals, you need to be aware that not asking your client the appropriate questions may be akin to professional negligence. Since "know your client" is often the preliminary step when meeting new clients, make a stellar first impression by taking into serious consideration "know your special needs client" where appropriate.

If the parents of children with special needs are your clients, be clear on the clients' comfort level *vis-à-vis* investment risk. This is a very appropriate point to consider in the use of life insurance as an estate back stop, to ensure that even if nothing else is left there will be at least a certain sum available to fund a testamentary trust for the child. In my experience, the parents are very prepared to live modest lives themselves to protect capital for this purpose, not realizing that they can usually fund the trust more economically with life insurance than with savings. The "return on investment" is almost invariably higher from this vehicle than from uncertain or very conservative investments.

I recall a 71-year-old client mother I assisted about eight years ago. Her husband was deceased, and she was subsisting in the family home supported only by her own OAS and GAINS income plus her son's provincial benefits. She also had $200,000 in a bank account for "security of capital" earning very little interest, and $300,000 in a RRIF which she intended to encroach upon at the required minimum amounts so there would be more left for her son.

She had no idea that when she died the RRIF income would be taxed at the maximum rate applicable, depending mostly on whether she died in January or December of the year of her eventual demise.

The money in the bank was shifted to a conservative segregated mutual fund, and a designation was made to the Henson trust we had created in her will, which would then be received promptly and without incurring estate administration tax.

She then had a policy of Term to 100 insurance put in place on her life, to be designated to the trust as well. This was funded by the untaxed withdrawals she made from the RRIF, after making use of her own personal exemptions together with the "disability" and "caregiver" tax credits that were available due to her son's marked disability and his living with her.

Even given her age and the fact that she smoked, it was still a much better plan than to simply wait to die and have a large RRIF taxed in her hands in the year of death.

Don't hesitate to collaborate with knowledgeable estate lawyers and other professionals who have experience in this area. In my experience, I have found a collegial approach both personally rewarding and very effective for the client.

PROVINCIAL DISABILITY BENEFITS

Once a qualifying child with disabilities reaches the age of 18 years, there are provincial disability benefits available that include financial, medical and other support benefits. While the disability benefits vary from province to province, it is important that you understand how you can provide financial planning to help special needs families and recipients of provincial disability assistance benefit from additional moneys. Special care must be taken so as not to jeopardize their benefits as this could translate into lost income, including lost dental and drug prescription coverage (a costly item to replace on a dollar-for-dollar value).

Many provincial disability programs fall under the umbrella of social services, with little difference between basic social assistance and disability benefits. Depending on your client's jurisdiction, or the jurisdiction of his or her loved one with special needs, consult the appropriate provincial ministry for specific qualification requirements. At minimum, certification of the disability by a medical doctor and asset-testing will be required for acceptance into the program.

Do not expect the staff operating the benefit programs to be of more than minimal assistance, or to inform you of benefits or services that could be made available if you know what to ask for. To be charitable at best, it is more often the case that provincial disability benefit programs are fraught with staff who provide misinformation about program eligibility to persons with disabilities, often forcing the applicant into inappropriately spending down their assets, inheritance, *etc.* Recently, I heard the term "bureaucratic disentitlement" used to described the denial of benefits and supports which should actually have been provided by the disability benefits program, and it sounds apt to me.

Because the amounts received annually from provincial disability programs leave the recipient living under the poverty line, any assistance you can provide in terms of financial planning is crucial to that family and will also provide peace of mind to your clients, providing for additional needs and costs often associated with disabilities. Get to know what other financial options are available within the relevant jurisdiction, as it varies from province to province.

Take the time to either familiarize yourself with the relevant provincial disability rules and directives or find a local organization and/or lawyer who deals regularly with this subject matter.

In Ontario, recipients of the Ontario Disability Support Program (ODSP) are allowed to inherit money without affecting their benefits, but there are some key limitations. For instance, if an ODSP recipient receives a straight inheritance (not a Henson trust within a will) he or she can inherit $100,000. Currently, any amount can be withdrawn specifically for disability-related items and services, but no more than $6,000 can be withdrawn annually for any use. This is not the case with the Henson trust, as explained in further detail below.

There are different levels of support available from the provinces. For instance, someone living in a "room and board" situation may receive a lower amount to cover shelter, while someone in a rental situation may receive a higher amount to cover rent, utilities, water, *etc.* For the information specific to your client's jurisdiction, see the relevant provincial ministry. In Ontario, it is the Ministry of Community and Social Services that delivers the ODSP.

Referring back to "bureaucratic disentitlement", I recall having a 50-year-old woman referred to me by a legal aid clinic in a small town. Five years before, she had inherited a sum of money from her mother and she had reported this to the local ODSP office. Instead of telling her what could be done to allow her to have this inheritance and continue receiving benefits, the ODSP office cut her off. She proceeded to live on her inheritance, reducing it to $15,000. Five years later, she heard about what she could have done, did those things with the help of a lawyer who assisted her, *pro bono*, and took the new information to the local office. The response was not to reinstate benefits but to tell her, "You didn't do it then, and now it's too late." This is obviously incorrect, and I had everything put back in place in about ten days, using an alternate technique which completely side-stepped the question of whether this was an appropriate response. Unfortunately, the new arrangement restored benefits but not the money she had spent over the years.

HENSON TRUST

The optimal estate planning arrangement for clients to provide for persons with special needs is called a "Henson" trust (a form of absolute discretionary trust). Named after a landmark case in Ontario in 1989, assets left by way of a will or other designation to a Henson trust does not disqualify the recipient from provincial benefits even if assets exceed allowed limits. Sadly, by the time the fight between the trustees and the Ontario government was resolved at the Court of Appeal level, Audrey Henson, the special needs person for whom her father had made provisions in his will, died. The silver lining in this tragedy is the fact that Audrey's painful fight cleared the way for families of persons with disabilities to find a vehicle that could make the all-too-real difference between living in stark poverty and having supplementary personal and special needs paid for by the trust, without jeopardizing provincial benefits.

You can create a Henson trust in a will by leaving an inheritance to a Henson trust (*testamentary* Henson trust), or you can create a Henson trust while the person is still living (*inter-vivos* Henson trust) so that the beneficiary does not have to wait for the benefactor to pass before receiving from the Henson trust. In conjunction with the very modest financial benefits provided by the provinces (maximum just over $1,000 per month in Ontario), the Henson trust can help to provide for supplementary special needs. This can mean the difference between living in poverty and living in modest comfort.

The key to creating a true Henson trust is in the wording, which must make it clear that, at the absolute discretion of the trustees named to manage the Henson trust, income and capital is to be paid out for the benefit of the named beneficiary of the trust. Poor drafting of a trust can result in it failing to meet the testator's true intention, and without the proper wording, the Henson trust can fail. For example, the language must indicate that the trustees have full and absolute discretion to pay out of the trust and that they are not required to pay out to the beneficiary upon demand. The beneficiary does not ever "own" the trust; unlike normal discretionary trusts, it does not "vest" in the beneficiary, who simply receives whatever payments or distributions are made directly from the trust to pay third parties for goods and services for the beneficiary, as directed by the trustees.

One of the keys to making a Henson trust work well over the lifetime of its special needs beneficiary is in the choice of trustees and planning for replacement trustees. Because the beneficiary cannot direct the trustees to pay out, it is crucial that trustees be chosen very carefully in terms of their ability to understand the trials and tribulations faced by the beneficiary as well as prudently investing the trust. Your role here is very important. Trustees will often look to their trusted financial professionals for prudent trust/capital investment advice. Once again, a careful review of all foreseeable disability-related costs will be important as you balance the need for payments and distributions over the beneficiary's lifetime.

Trustees are most typically family members or friends rather than corporate trust companies, although these can also be appropriate. Depending on the age of the beneficiary and the trustees, your client may wish to spell out in detail who will be replacement trustees and, where applicable, how multiple trustees will make decisions, replace themselves and when to wind down the trust. It is always helpful to name trustees of different age groups as part of common sense estate planning; you do not want to see a trust set up with all three trustees, for example, being over the age of 80, with the beneficiary being in his or her teens. Many families do not have more family trustee alternatives than one or two siblings or cousins at the most, so the net may have to be cast over a larger group before appropriate trustees are named.

My trust arrangements almost invariably provide the initial trustees with the power to replace themselves as time goes by, either while alive or by appointment in their own wills. The wording for this is not complicated, and it avoids future court and legal costs, as well as minimizing potential future litigation associated with trustee replacements.

Given the absolute power of the trustees, and the common provision that the ultimate distribution of the trust assets remaining when the beneficiary dies go to the surviving siblings or their children, there is a potential for a conflict of interest on the part of the sibling trustees. This issue and the family dynamics must always be discussed with the client testators and dealt with accordingly.

Because drafting of the trust is key to how it will be interpreted by provincial authorities, contact a lawyer who specializes in trusts, and is familiar with Henson trusts, to set up the necessary vehicles to assist with your client's estate planning goals. Ask him or her how many of these arrangements he or she has drafted for clients, and whether any have come into place after the testator has passed on. The larger part of my estate practice is not settling the estates of my special needs families, but rather being brought on the file when incorrect arrangements or no arrangements have been put in place, and the executors and trustees come to my office to have me help them sort out the mess. It is worth noting that not all provinces have either formally accepted the Henson trust as an allowable asset or had the concept tested in their courts.

RRSP ROLLOVERS TO AN ADULT DEPENDENT CHILD AND LIFETIME BENEFIT TRUSTS (LBTS)

Consider a common scenario. A mother (spouse predeceased) dies holding a sizeable RRSP or RRIF. The income falls into her income in the year of death and is taxed accordingly, often at a high marginal rate. Although it has been possible since 2003 to have this registered asset roll over to an adult dependent child or grandchild, as it would to a spouse, there are various *Income Tax Act* (ITA) requirements to allow this to take place. The new registered asset could and often would result in provincial benefits being cut off, and in many cases a court application to have someone appointed guardian of the child's property and person would be necessary to provide a legally authorized party to handle the rollover and manage the asset if the child lacks competence. Still, there are now, and will be in future, many family situations where this must be addressed rather than paying excessive income taxes. This variable also has an impact on the overall estate plan and the distribution of the estate in many cases. If the estate consists of a house and the RRIF of a similar value being divided between two heirs, it requires more planning than simply providing for the estate to go equally between the two if one receives the RRIF directly on a deferred taxation basis.

In an effort to protect registered retirement savings and/or registered retirement income funds from being eaten up by taxes at the time of your client's death, the Lifetime Benefit Trust (LBT) is a new option whose most recent incarnation was last sighted in Bill C-10 during the last Parliamentary Session, but unfortunately died on the Order Paper when Parliament was prorogued in December 2008. Hopefully, we will still see this new type of trust re-emerge on the Order Paper and eventually see the light of law.

The LBT will be a valuable tool when your client wants to leave a personal trust in his or her will for a special needs, financially dependent, child, grandchild or spouse, with the additional comfort of knowing that the RRSP or RRIF assets he or she dedicates to the LBT could be protected from creditors with an election to deem the RRSP or RRIF assets to have been received by them, with the possibility of a tax-deferred rollover of said assets to that special needs family member.[2]

Since the goal of the LBT is to leave a certain portion of your estate to your special needs, financially dependent family member, attention must be paid to properly defining relevant terms such as "financially dependent". If the dependant's income for the year preceding death was less than the basic personal amount ($9,600 for 2008), the financial dependence definition is met. If the dependant is mentally or physically infirm, add to the "basic personal amount" the disability tax credit amount[3] ($7,020 for 2008) for a 2008 total of $16,620[4] to meet the definition of "financially dependent" for the purpose of setting up an LBT.[5] Because this income threshold is most likely higher than the amounts received in the hands of the special needs beneficiary, from provincial disability benefits, government program benefits should

2 Tim Cestnick, "Help an infirm dependant with lifetime benefit trust" *The Globe and Mail* (11 September 2008), online: <https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20080911/RCESTNICK11>.

3 For a complete definition of "mental and physical impairment", see the section in this chapter on Disability Tax Credits and see also the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

4 Tim Cestnick, "Help an infirm dependant with lifetime benefit trust" *The Globe and Mail* (11 September 2008) at 1, online: <https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20080911/RCESTNICK11>.

5 The term "financially dependent" is formally defined in the *Income Tax Act* in subsection 146(1.1) and provides the formula for calculating financial dependence.

remain intact and unchanged. Where provincial disability programs require trust reporting to satisfy income reporting requirements, one need report only the amounts disbursed directly to the disabled beneficiary.

The LBT is a true trust, and it is structured and worded to meet the terms required by the ITA. It has terms different from those in a Henson trust, so it will almost certainly be created to run parallel with the Henson trust, which is intended to hold inheritances and proceeds of designated assets.

The LBT trustee(s) may have absolute discretion on the amounts paid out to the disabled beneficiary. The trustee discretion can provide much-needed assistance, especially when the beneficiary suffers from a mental disability that affects his or her 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. Look to your clients' choices of trustees and take the time to discuss the importance of choosing trustees and their replacements, and clarifying their obligations to the beneficiary. The more in-depth discussions that take place (and are noted) while your client is alive will help to keep everyone directly involved on the same page in terms of duties and expectations. Trustees are required to consider the needs of the beneficiary, including his or her comfort, care and maintenance.[6]

Like a testamentary Henson trust, LBTs will also be incorporated into your client's will. Your client will not have to decide whether a Henson trust or an LBT is most beneficial because it is not an *either/or* situation. For example, your client could potentially set up a Henson trust for the estate and set up an LBT for the RRSPs. If desirable, several beneficiaries can be named to the Henson trust, while the LBT is limited to only one beneficiary; the addition of other beneficiaries may disqualify the LBT, which is supposed to be used only by the beneficiary during his or her lifetime.[7]

As long as the special needs child is the ultimate recipient of the retirement savings (RRSPs, RRIFs), tax can be deferred and possibly eliminated completely if the special needs child has no other taxable

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6 Murray Sklar, "Estate Planning: The New Lifetime Benefit Trust", *The Estate Planner*, iss. 162 (July 2008) at 2, online: <http://www.cch.ca/newsletters/Financial Planning/september_2008> (paid smdsubscription required).

7 Alison MacAlpine, "Vehicle helps parents care for disabled children", online: <http://www.investmentexecutive.com/client/en/News/ImprimerDetail.asp?Id=46896&cat>.

income.[8] The potential for tax savings is considerable when one uses the personal amount and the disability amount.

Another important provision of the LBT is the need for the RRSP or RRIF funds passing, in the will, to the disabled beneficiary, to be put into a special form of annuity.[9] Proposed amendments to the ITA include allowing the annuity to be acquired by the trust or the estate of the deceased individual, rather than by or on behalf of the child.[10] Our current understanding is that the qualifying beneficiary will be allowed to deduct the purchase price of a *qualifying trust annuity*[11] where a trust is the annuitant and the financially dependent disabled child is the sole beneficiary under the trust.[12] This is helpful where the disability affecting the beneficiary is mental in nature *and* affects the beneficiary's ability to establish or administer the account.

Once the qualifying life annuity (for the life of the disabled beneficiary or for a fixed term equal to 90 years minus the age of the disabled beneficiary) is purchased with the RRSP or RRIF proceeds, the LBT begins receiving the annuity payments. It will be very interesting to see how the expected lifetime of the beneficiary is calculated, and what efforts will be made to determine if the annuity should be specially rated and shortened based on the nature of the disability.

Any amounts paid out of the LBT to the beneficiary (whether income or capital) will be taxable to the beneficiary and the fair market value of the annuity at the time of the beneficiary's death will be taxable to the beneficiary upon his or her death.[13] If there is a guaranteed period or fixed term associated with the qualifying trust annuity, there is a

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8 Guy Desmarais of Collins Barrow, "Estate Planning — the Finer Points: Special Issues for Those with Special Needs", online: <http://www.collinsbarrow.com/news_showArticle.asp?articleID=240>.

9 Annuity purchased for the Lifetime Benefit Trust must be a qualified lifetime annuity.

10 "Planning for Registered Retirement Savings Plan" by M. Hoffstein, H. Carr, C. Weigl and L. West of Fasken Martineau DuMoulin LLP, *Estate Planning Bulletin* (March 2006) at 5, online: <www.fasken.com>.

11 Note that complete definitions of the types of qualifying trust annuities are located in the proposed legislated changes. See LEGISinfo on the 40th Parliament — 1st Session for the exact proposed wording, online: <http://www.parl.gc.ca/legisinfo/index.asp>, and click on Bill C-10. If you click on Bill C-10 for the current, 2nd Session, you will be brought to the current budget tabled in Parliament and this is not the same legislation.

12 "Planning for Registered Retirement Savings Plan" by M. Hoffstein, H. Carr, C. Weigl, and L. West of Fasken Martineau DuMoulin LLP, *Estate Planning Bulletin* (March 2006) at 5, online: <www.fasken.com>.

13 Tim Cestnick, "Help an infirm dependant with lifetime benefit trust" *The Globe and Mail* (11 September 2008) at 3, online: <https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20080911/RCESTNICK11>.

requirement that if death occurs during the guaranteed period or fixed term, any amounts that would otherwise be payable after the death of the taxpayer must be commuted into a single payment.[14]

It remains to be seen when the LBT will become law. Worth watching will be the Canada Revenue Agency's (CRA'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.

I'm aware of an existing estate in which an RRSP was designated to an LBT prepared according to the terms of the proposed amendments to the ITA. The testator died and the estate was settled, but the final decision of what to do with the RRSP proceeds was delayed for a year or more. Since the legislation was intended to be retroactive to 2003 once passed, I have been advised that the elections and arrangements intended to roll over the RRSP have been made, and that the parties are now waiting for the legislation to be put in place. This was a brave tactical decision, but even if it is unsuccessful the result will be no worse than not making every effort.

TAX CREDITS

In my experience, when I have asked parents of children with cognitive and developmental disabilities (which clearly qualified them for the disability tax credit) if they had applied for the credits, 45% answered "no" or "unsure" to this question! The realm of tax credits is one huge area that is often overlooked in terms of helping clients lower their payable income tax, as discussed below in greater detail. In addition to lowering taxes, qualifying for tax credits can also be a requirement for applying for other money-saving vehicles such as the Registered Disability Savings Plan.

To qualify, a person must have a *severe and prolonged impairment* (expected to last at least 12 months).

The filing process can be onerous, because it requires the involvement of a medical professional and there is sometimes disconnect between how physicians complete forms and how the CRA civil servants process applications at the various centres across the country.

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14 Murray Sklar, "Estate Planning: The New Lifetime Benefit Trust", *The Estate Planner*, iss. 162 (July 2008) at 2, online: <http://www.cch.ca/newsletters/Financial Planning/september_2008> (paid subscription required).

Because many applications are not accepted on first submission, specialized assistance is often required in dealing with Disability and Caregiver Tax Credit filings, as discussed below.

The Disability Tax Credit (DTC)

The disability amount can be found on line 316 (for self) and line 318 (transferred to a supporting relative) of your client's tax return. The disability tax credit is a non-refundable tax credit for individuals who have a severe and prolonged impairment in physical or mental functions. In order for an impairment to be considered prolonged, it must be expected to last, or have lasted for a continuous period of at least 12 months.[15]

Asking clients whether or not they currently apply for or receive the disability tax credit (DTC) for themselves or for a family member does not often translate into a clear answer. Very often, clients are unsure as to whether or not they are or have already qualified for the disability tax credit.

The individual must be "markedly restricted"[16] in at least one of the following categories: speaking, hearing, walking, elimination (bowel or bladder functions), feeding, dressing, performing the mental functions of everyday life, life-sustaining therapy to support vital function and the recently introduced cumulative effects of significant restrictions.

To qualify as having a severe and prolonged impairment, one must have the "T2201 Disability Tax Credit Certificate"[17] (hereafter referred to as T2201) form certified by a qualified professional related to the impairment: for example, a medical doctor, physiotherapist, optometrist, psychologist, audiologist, speech-language pathologist or occupational therapist. The qualified practitioner must certify on the T2201 that the impairment meets specific conditions within the set category, which varies depending on the impairment.

If the medical practitioner charges your client to complete the T2201, the client can claim this as a medical expense on line 330 of his or her tax return. We will discuss medical expenses briefly, later in this

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[15] Canada Revenue Agency, T2201 Disability Tax Credit certificate form, 2008.

[16] "Markedly restricted" has been defined by CRA as "all or substantially all the time, and even with therapy (other than life-sustaining therapy) and the use of devices and medication, either: [1] Your patient is unable to perform at least one of the basic activities of daily living …; or [2] It takes your patient an inordinate amount of time to perform at least one of the basic activities of daily living".

[17] The T2201 form can be found on CRA's website, online: <http://www.cra-arc.gc.ca/E/pbg/tf/t2201/>.

chapter. Doctors and other professionals are usually helpful and co-operative in this process, with some exceptions. They are busy with their practice and this may appear to be just one more piece of paper to complete. I recommend that the applicant make sure that it is understood that a reasonable fee for the service is quite appropriate, as this may assist the doctor to find the time to focus on the task at hand.

Your clients should be able to retroactively file for the disability amount, back ten years, due to the Tax Payer Relief Provisions in the ITA.[18] The DTC can be a very lucrative tax savings measure for your clients. To give you a brief overview — in 2008, the DTC amounts to over $1,600 in tax savings. When one files for the full ten-year period, the possible tax savings amounts to over $13,000[19] for adults and approximately $20,000 for children 18 or under who qualify.[20]

If your client with the impairment does not have a taxable income, he or she can transfer his or her credit to a supporting relative, such as a parent, grandparent, child, grandchild, aunt, uncle, niece and nephew. You may also transfer the disability amount to a brother and sister but since this was only introduced in 2001 you may only retroactively transfer the amount to that date. The disability amount can be transferred in either its entirety or as the remainder of what the dependant was unable to claim himself or herself.

A majority of the categories of impairment are relatively straightforward to assess, with one important exception. The "mental functions necessary for everyday life" is often times difficult to assess for eligibility due to the large amount of grey area contained within this intangible category. As a result, it's not unusual to have a medical professional hesitant to certify that a patient is markedly restricted in this category. Fortunately, there have been a few resources released by medical associations to assist medical professionals with assessing their clients.

One document released by the Canadian Psychological Association (CPA) in response to suggestions they made to the House of Commons Sub-Committee on the Status of Persons with Disabilities attempts to assist medical professionals with deciphering what qualifies as a being markedly restricted in the "mental functions necessary for everyday life".

In the document "Eligibility of Persons with Impairments in Mental Functions for the Disability Tax Credit: What Qualified Persons Need to

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18 Canada Revenue Agency, "IC07-1 Tax Payer Relief Provisions" (31 May 2007), online: <http://www.cra-arc.gc.ca/E/pub/tp/ic07-1/ic07-1-e.pdf>.

19 This is approximate because it depends on a number of variables.

20 The disability tax credit (DTC) is in combination with the supplement for children for the DTC and the Canada child tax benefit.

Know about Attesting to Eligibility",[21] the CPA goes on to further define and clarify the category by stating that "… an individual can be markedly restricted if their only impairment is memory or adaptive functions (which includes abilities related to self-care, health and safety, social skills and common simple transactions) but not if their only impairment is problem solving, goal setting or judgment. An individual must be impaired in problem solving, goal setting *and* judgment in order to qualify".[22]

Comment [CU1]:

In 2005, the CRA introduced a new category of eligibility, "Cumulative effect of significant restrictions". This category is useful for individuals who are disabled but not restricted enough to qualify as being markedly restricted. It should be noted that because this category was introduced in 2005, you may only file retroactively back to that point. Significantly "restricted" has been defined by the CRA to mean that "although your patient does not quite meet the criteria for markedly restricted, his or her ability to perform the basic activity of daily living or vision is still substantially restricted".[23] In other words, if an individual takes an inordinate amount of time to dress, feed himself or herself and walk a few city blocks, taking all restrictions into consideration may be enough to qualify as being markedly restricted. This is a welcome addition but unfortunately another ambiguous threshold that will require further redefining at a later date.

As a side note, it is recommended that you only complete the cumulative effect category if you must. In one instance, the CRA failed to notice that a client had not only been certified by the doctor as qualifying for the cumulative effect category, but had also been certified as being restricted in mobility back to 1998. This resulted in the client only being found eligible back to 2005, even though the doctor clearly stated his patient has been markedly restricted prior to 1998. As a result, all the information had to be resubmitted, with emphasis on the mobility restriction rather than the cumulative effect category, and the usual process time on the CRA's end doubled from three to six months. Unfortunately, this was likely due to the oversight of one or two CRA employees.

Many people are unaware that you can make a disability amount claim against an estate. With elderly individuals, often times the last few years of their life can be a trying time; more often than not an individual

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21 Canadian Psychological Association, "Eligibility of Persons with Impairments in Mental Functions for the Disability Tax Credit: What Qualified Persons Need to Know about Attesting to Eligibility" (February 2008), online: <http://www.cpa.ca/cpasite/userfiles/Documents/advocacy/tax%20credit.pdf>.

22 *Ibid.*

23 Canada Revenue Agency, T2201 Disability Tax Credit certificate form, 2008.

can be affected by a number of age-related disabilities such as arthritis, dementia, *etc.* The 2001 Participation and Activity Limitation Survey indicated that seniors represent the highest rate of disabilities in Canada, with 41% being restricted within their group.[24] Keeping this in mind, it is easy to see that many elderly clients who have children with disabilities also likely qualify for the disability tax credit for themselves. We try to shift our focus to the larger family, looking *up the tree*, as it were, rather than solely focusing on the child with disabilities.

If the client did not manage to file the disability amount while he or she was alive, then fortunately it is not too late to do so *post mortem*. When applying for probate and settling estates, we frequently also back-file for the disability and caregiver credits, which usually total about $18,000. This certainly is enough to pay legal and estate fees in most cases.

In order to make a disability amount claim against an estate, your client will require: the deceased person's death certificate or funeral director's statement; the deceased person's social insurance number and a complete copy of the will or other legal document such as a Certificate of Appointment of Estate Trustee with a Will or a Certificate of Appointment of Estate Trustee without a Will.[25] It should also be noted that you can transfer a dependant disability amount to an estate as well if it is beneficial to do so, if the credit applies but was not used. This typically recaptures $13,000 for the estate.

When assessing your client's tax return, you should also be aware that any attendant care costs in excess of $10,000 will disqualify your client from claiming the disability amount as well. If you are able to keep the attendant care costs below $10,000, then you can claim both under what is known as the *part-time attendant care rule*. This would only be beneficial to your client if it produced a higher claim than the full-time attendant care costs.[26]

The "preferred beneficiary election" is available to trustees of trusts when the beneficiary qualifies for the disability tax credit due to his or her being "markedly restricted in the activities of daily living". This provides an alternative way to attribute income to the low-income child,

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24 Department of Finance Canada, "Tax Expenditures and Evaluations — 2004", online: <http://www.fin.gc.ca/taxexp-depfisc/2004/TaxExp04_e.pdf>.

25 Canada Revenue Agency, "Preparing Returns for Deceased Persons — 2008", online: <http://www.cra-arc.gc.ca/E/pub/tg/t4011/t4011-08e.pdf>.

26 Gena Katz, CA, CFP, "Taking Care — Clients Helping Their Parents with the Bill Can Claim Certain Tax Credits", online: <http://www.advisor.ca/images/other/ae/ae_0806_takingcare.pdf>.

rather than following the "paid or payable" rule to have income declared in the beneficiary's hands.

Income can be deemed to be "phantom" income of the child without actually giving it to the child, in turn spending it as after-tax capital in ways that benefit the child without affecting provincial disability benefits.

Additional Supplements for DTC-Qualifying Minors

There are additional tax credits and child disability benefits which substantially increase the recapture outcomes for children. In a recent case involving a divorced mother of two boys, aged 14 and 12 with disabilities, we successfully recaptured $52,000, a substantial amount for a teacher (in this case), almost equivalent to her net take-home pay for an entire year.

In another example, two retired parents in their 60s handle daily needs for their two adult daughters, both with disabilities, and three grandchildren, one of whom is also developmentally disabled. We grouped the disability, caregiver and child disability amounts, transferred them to the taxpaying parents and grandparents, and recaptured $42,000 in total for one family. As you can imagine, this is a very gratifying part of the practice.

If your client's child is 28 or under and qualifies for the disability tax credit, your client may also claim the *supplement for children with severe and prolonged impairments* for the years when the child was under 18. There are no extra eligibility requirements once the child can claim the disability amount. This supplement was introduced in 2000 and as such can be retroactively filed back to that date, and allows for an approximate additional $640[27] in tax savings for each year. This amount is, however, reduced dollar-for-dollar by any child care, medical expense claims or attendant care expenses in excess of $2,399.[28]

The Child Tax Benefit (CTB) and the Canada Child Disability Benefit (CDB)

The Child Tax Benefit (CTB) is a federal, refundable tax credit made up of the National Child Benefit (NCB) and two supplements, the National

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27 This is approximate because the federal amount is $4,019, multiplied by the lowest marginal tax rate of 16% equals $643.04.

28 Christine Van Cauwenberghe, *Wealth Planning Strategies for Canadians 2009* (Toronto: Thomson Carswell, 2008) at 263.

Child Tax Benefit Supplement for lower-income households and the Child Disability Benefit (CDB).

The CDB is a tax-free benefit for families who care for children with disabilities under the age of 18. It is a supplement to the monthly CTB for children who already qualify for the DTC. The individual claiming the tax credit must be the child's primary caregiver, the child must qualify for the CTB, and both parents must have filed tax returns for all years being retroactively filed. The CDB may be retroactively filed back to its introduction in July 2003.

The CDB amount is calculated using a base amount, which is associated with the number of children in the household that receive the CTB. You are eligible to receive the full CDB amount if your client's adjusted family net income is less than the base amount for the family size. For instance, a family with one child claiming the CDB would have to be making less than $37,885 in 2008 to claim the full amount. The CDB would not be fully eroded until the family net income exceeds $150,000. The CDB provides up to $2,395 per year, at $199.58 a month (for the period July 2008 to June 2009).[29]

The Caregiver Tax Credit (CTC)

The caregiver tax credit found on line 315 of the federal tax return is available to individuals who provide in-home support for a relative who is a dependant, is over 18 and resides with the supporting relative in his or her residence at some time in the year. The dependant must be your client's child, grandchild, brother, sister, niece, nephew, aunt, uncle, parent or grandparent in order to qualify. If it is difficult to determine an individual's primary residence, a general rule of thumb is that it is usually the address from where the individual files his or her income tax, subject of course to the CRA's rules governing residence. The CTC is currently worth approximately $600 in annual tax savings. Similar to the disability tax credit, it can be retroactively filed for ten years, which can result in an overall tax savings of approximately $5,000. The CTC erodes dollar-for-dollar if the dependant's income exceeds $13,986[30] and becomes completely eroded if it tops the $17,745 threshold.

You cannot claim both the caregiver tax credit and the amount for an infirm dependant 18 or over.

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[29] Canada Revenue Agency, "What is the Canada Child Disability Benefit?" (8 February 2009), online: <http://www.cra-arc.gc.ca/bnfts/fq_cdb-eng.html#q1>.

[30] Paul B. Hickey and Sandra Bussey, *Tax Planning 2009: For You and Your Family* (Toronto: Thomson Carswell, 2008).

Amount for Infirm Dependants over 18

The amount for infirm dependants over the age of 18 can be of limited use to some but not all. Unfortunately, this amount is income-tested and the individual cannot have an income greater than $9,906 to take full advantage of this credit.[31] If the individual is receiving disability-related support from the Ontario Disability Support Program (or your client's provincial equivalent), by the time the support is calculated against the individual's net income, he or she receives little if any of the credit at all. If your client receives disability support, which most clients do, then it is best to use the caregiver tax credit found on line 315 instead. Clients who are currently using line 306 and not receiving any benefit from it should send in T1 adjustments to reverse these amounts before putting the correct caregiver amount in place. Unfortunately, it is not uncommon to see respected accountants and financial advisors alike suggesting their clients use line 306 instead of line 315 on their tax return when they receive disability support or their net income exceeds the above threshold.

Medical Expense Claims

Medical expense claims are one of the most commonly used tax provisions in the ITA. Individuals are able to claim the portion of the expenses that exceeds the lesser of the two following amounts: 3% of the individual's net income for the year or a fixed amount, which was $1,614 in 1997 (the amount is indexed to inflation). For a full list of what is accepted and not accepted as a medical expense, please refer to the CRA's website.[32]

One interesting bit of information that many people are unaware of is that you can claim your child's tuition as a medical expense if it has been prescribed for the child by a psychologist or other medical practitioner. Often, a child with special needs will greatly benefit from having a smaller teacher-to-student ratio. In order to qualify, you must meet the following conditions: the school must specialize in teaching students with learning disabilities; the school must certify that your client's child is enrolled in this school because of a learning disability, and due to the lack of appropriate resources and services in the public school system,

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31 Canada Revenue Agency, "Are you eligible for the amount for infirm dependents over 18?" (8 February 2009), online: <http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns300-350/306/lgbl-eng.html>.

32 Canada Revenue Agency, list of accepted medical expenses, online: <http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns300-350/330/llwbl-eng.html>.

the child needs to access the specialized services of the prescribed school.[33]

As you can see, disability-related tax provisions can be very valuable to clients with special needs. The government realizes that there are certain costs associated with supporting a special needs person, and has adopted many different tax credits, deductions and provisions to ensure that he or she is compensated for some of his or her support. Unfortunately, the onus lies with the tax filer to complete his or her taxes in the most beneficial way, and many people with disabilities and/or their caregivers do not know how, or do not have the time to properly do this. By improving the special needs component of professional financial education, advisors, accountants and others will be better equipped to ensure that they are maximizing their client's options and saving all the money he or she rightfully ought to have.

REGISTERED DISABILITY SAVINGS PLAN (RDSP)

The recent addition of the Registered Disability Savings Plan (RDSP) requires that any new plan beneficiary already qualify for the DTC, so the DTC application being accepted is critical to the set-up of the RDSP for special needs clients. Only one RDSP account may be set up per qualifying individual, and only that beneficiary is entitled to any payments, unlike other registered plans such as the Registered Education Savings Plan (RESP), where you can have multiple plans per person and where effectively tax-free returns of contributions are allowed. You can potentially transfer an RDSP from one financial institution to another once the rest of the financial institutions come on board (the rollout by all the major banks, except one, has been less than stellar, to say the least).

This new type of registered savings plan will help friends and families build financial security for the special needs person in their lives. This is not an alternative to setting up a trust for a person with disabilities, but should be used in conjunction with other vehicles, such as Henson trusts, insurance products, segregated funds and LBTs to build a solid financial plan.

Similar to the RESP, contributions are not tax-deductible, and earnings and growth accrue on a tax-deferred basis.

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[33] Canada Revenue Agency, Income Tax Interpretation Bulletin No.: IT-519R2 (consolidated), "Medical Expense and Disability Tax Credits and Attendant Care Deduction", section 29, at 8, online: <http://www.cra-arc.gc.ca/E/pub/tp/it519r2-consolid/it519r2-consolid-e.pdf>.

Anyone can contribute to an RDSP; you do not need to be related in any way. The contributions grow tax-free until withdrawn, at which time a proportion of the plan (earnings and growth received) is taxable and will need to be declared as income in the hands of the beneficiary at that time. Persons receiving provincial disability benefits can set up an RDSP, without going through an asset-test and without it affecting provincial disability benefits, where applicable.[34] Unlike RRSPs, there are no maximum annual contribution restrictions. There is a maximum of $200,000 that may be contributed to any one RDSP over the course of its lifetime, and all contributions must be made before the beneficiary's 60th birthday.

People with disabilities receive approximately $12,000 in untaxed social benefits each year in most provinces, or less. If they also work, employment income will offset provincial benefits to varying degrees. In my experience, it is unusual to find a disability benefit recipient who nets more than $21,287 per annum from both sources. Children under 18 do not receive disability benefits.

If the beneficiary's income level is less than $21,287 (if under 18, use family's net income level, and if over 18, use the beneficiary's net income only), the beneficiary should receive annual Government of Canada Disability Savings Bonds, to a lifetime maximum of $20,000 per RDSP. Add to this the Canada Disability Savings Grant, if the beneficiary's income is $75,769 or less, for an additional $3,500 per year, to a lifetime maximum of $70,000.[35]

Simply put, if the beneficiary over the age of 18 meets the appropriate income levels, an initial contribution of $1,500 can result in $4,500 in matching government funds. However, with every plan there are pitfalls to note. Be aware that there are complex rules governing the withdrawal of funds from RDSPs that could potentially see the beneficiary having to repay government grant and bond moneys if withdrawals are made before the funds have vested for a period of ten years.[36]

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[34] As of February 14, 2009, the following provinces and territories officially exempted RDSP income from affecting provincial benefits: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec (partially), New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Northwest Territories and Yukon.

[35] The amount to be received under the Canada Disability Savings Grant and Bond are graduated depending on income levels. See online: <www.hrsdc.gc.ca> for income specific amounts.

[36] Current discussions with the federal government regarding the complexity of the current ten-year-hold-back rules are under way. The federal government is being asked to loosen the restrictions to make it easier for financial institutions to administer the RDSP.

Beneficiaries will only receive grant and bond moneys up until the year in which they turn 49 years old.

If maximum matching contributions have been made since the child turned 18, then when he or she turns 38, there will be no further federal contributions available. The total of $90,000 grants and bonds available will already have been maximized. If the plan is set up for a child at a young age, the end of contributions will be earlier, but the growth on the total contributed will presumably be larger than if the plan is set up at a later age.

Maximize the sources of contributions to an RDSP. Ask your client for a list of potential contributors and send them a letter informing them that an RDSP has been set up for the special needs person in their life and show them how to contribute and what it could mean for the intended beneficiary's quality of life. Some clients may only be able to provide a limited amount of contributions and you want to try to maximize contributions so that matching government contributions are received annually, for the potential maximum of 20 years, allowing room before the $200,000 lifetime limit is reached.

The governing legislation and regulations outline the two forms of payments allowed under the RDSP: Lifetime Disability Assistance Payments (LDAPs); and Disability Assistance Payments (DAPs). LDAPs are mandatory payments in the year the beneficiary turns 60 years of age, calculated by a legislated formula as follows:

$$\text{FMV of the RDSP} / 3 + (\text{life expectancy} - \text{age})$$

DAPs, however, must be specified at the time the plan is set up. Whoever is responsible for setting up the plan will need to mention this and check the bank account agreement regarding lump-sum withdrawals. RDSP payments are "blended" on a *pro-rata* basis, since the contributions were made with after-tax dollars, while the grants and bonds, as well as interest/earnings on the whole plan, are taxable.

For assistance with running RDSP scenarios and calculating the potential returns, there is a great tool available at <http://rdspadvisor.org>, where you will find a valuable RDSP Calculator to crunch those numbers. This is a great website, full of recent news, developed by parents of special needs children who have spent a great deal of time and effort lobbying the government and providing a great support network for families affected by special needs.

As beneficiaries of RDSPs near their retirement years, they can find comfort in knowing that RDSP income will not affect their entitlement to: Old Age Security (OAS) payments, GST credits and the CTB.

In the event of the RDSP beneficiary's death, the plan's value is paid out to the beneficiary's estate, subject to the ten-year-assistance holdback rule (note: all RDSP beneficiaries should have a current will reflecting the inclusion of the RDSP otherwise the RDSP will likely have to be disbursed according to the relevant provincial rules of intestacy, in other words, as if they had died without a will).

Currently, we have encountered a hiccup in the administration of the RDSP, specifically regarding the difficulties of parents of special needs children who are over the age of 18 and lack the requisite competency to sign Continuing Powers of Attorney for Property. In early 2009, organizations such as PLAN went back to the government, asking for a loosening of the rules governing the opening of RDSPs. Parents of special needs children who are over the age of 18 and lack the necessary competency to sign powers of attorney have been turned away from financial institutions until they provide proof of formal guardianship standing. While some provinces such as British Columbia and Manitoba already have alternative arrangements such as Representation Agreements in place, others like Ontario do not, and are currently requiring parents to seek formal guardianship status, which is a lengthy (could take a year if not more) as well as costly (minimum of $5,000) process to embark upon.

Since discussions with the relevant government authorities are still under way, it remains to be seen how flexible the provinces will make the currently complex and rigid rules. Unfortunately, there is a real disconnect between the goals of the program and the rules and regulations governing its administration. This is often the result of policymakers drafting in isolation of their intended audience. Further consultations with leading organizations such as PLAN Canada should help policy writers understand how to tweak what is working and discard what is unnecessarily complicated and arguably overly onerous for families already coping with life's own complications.

For a list of financial institutions currently administering RDSPs, please see the federal government's Human Resources and Development website at: <http://hrsdc.gc.ca> for details.

PENSION PLANS

Pension plans are a valuable part of estate planning. They are often the fruit of many years of diligent work on the part of the client (employee), and the prudent investments and expenditures of the pension managers (employer), always with the same intention: to provide financially for the later periods of our lives.

Pensions typically have a survivor pension, as part of the overall succession plan for spouses and children when the main income earner has passed on.

We realize that a spousal pension may well result in the loss and clawback of other benefits, such as federal and provincial income supplements (GAINS) and OAS benefits. The efforts we make to split income and reduce the usurious rates of taxation in Canada are generally defeated when one spouse dies and passes on pensions, investments earning income and other family assets to the surviving spouse.

A family with a child or children with disabilities in which both parents have committed themselves to caring for all their children as their needs require would benefit from specialized advice when planning for retirement with private corporate Individual Pension Plans (IPPs) as well as public sector pensions across Canada.

It is entirely feasible for an IPP to designate a survivor pension for a spouse, obviously, and from there, a pension for an "adult dependent survivor", such as a child with disabilities, is a small step.

Various statutory pensions provide "adult dependent survivor" pensions for children with disabilities. Ontario examples of these include: Teachers pensions, OMERS pensions, OPG Ontario Power Generators pensions, OPSEU and others.

The difficulty is that pension income will be offset dollar-for-dollar from provincial disability benefits! A 100% offset is not a good use of well-earned pension income. This is not why parents work hard all their lives, to remove and replace the provincial share of support for their children. The legislative intent of provincial disability benefits is to continue a sharing of support from the province, the community, the family and the person with disabilities.

The better plan is to have the pension income paid to a testamentary Henson trust, created by the will of the parent, rather than paid to the child. It is also feasible to have the pension paid to the trust upon the death of the pensioner rather than on the death of the spouse if this is preferable for tax efficiency, depending on the tax bracket of the surviving spouse. There is no sense in giving income to a surviving spouse to be taxed at high marginal rates, thereafter used to provide for the child, when it may be taxed at reduced rates at the start.

Another alternative, which will be appropriate when considering the future plan of care for a child with disabilities, is to commute the pension into a lump sum and have this directed to the trust. This could then be used to purchase shelter for the child, or to be reinvested according to "prudent trustee investment guidelines". In Ontario and other provinces, such guidelines have replaced the approved list of investments defined by statute (to which professionals found workarounds anyway).

For example, it may be appropriate to invest in dividend-earning stocks rather than interest-earning assets, to make use of the dividend tax credit and further reduce taxation.

Pensions are a major source of income later in life for both wealthy families and lower income families. Both will also often have a Registered Retirement Savings Plan (RRSP/RRIF). For higher income earners, this is a component of their overall investment and retirement strategy, designed to allow asset growth without annual taxation of the income earned. Unfortunately, upon retirement, this RRIF income is subsequently taxed at high rates in the hands of the contributor or the spouse.

In addition to IPP beneficiaries, there are going to be hundreds of thousands of unwitting "adult dependent survivor" pensions coming into play as the "baby boom" generation retires. Relatively few of these employees even know that such pensions for their children exist. These pensions often become known to the family only after the pensioner has passed on and the family seeks estate settlement assistance from knowledgeable accountants, financial planners and lawyers.

The same is true of the OMERS pension, another Ontario provincially legislated pension, which provides a pension for adult children with disabilities. The general rule for Canadian pensions is that the disability must be a result of early onset or young adult disabilities.

The disabilities may be any combination of physical, mental health and cognitive developmental disabilities. Establishing the facts of the disability and pension applicability takes place after the death of the parent(s), but documentation can be put in place beforehand.

From an accounting standpoint, if these families are properly advised, they will create testamentary and *inter vivos* Henson trusts to provide for their children. These trusts will be created both while the parents are alive and upon each of their deaths. This will generate trust accounting and tax filing work equivalent to probably over 200,000 new client files in Ontario alone.

Due to the common use of the "preferred beneficiary election" for the trusts, depending upon circumstances, the tax returns for the beneficiary may also require attention.

For a thorough discussion of pension plan options, see Part II: Individual Pension Plan (IPP) Essentials, in this book.

INSURANCE PRODUCTS

We see the television advertisements daily; it seems everywhere we turn these days, we are inundated with offers to purchase insurance. While every insurance policy needs to be reviewed on its own merits, insurance policies are one way to help minimize the chance of debt after death and are an additional vehicle to planning for your client's special needs, or those of the special needs person in your client's life. For a comprehensive look at insurance and annuity options, see Part IX: Personal Risk Management and Maximizing Estate Benefits (Chapters 62–67) for specifics.

Clients are often preoccupied with two matters: concerns about the child with disabilities and financial stability to care for their loved ones after they are gone. Add to this the fact that personal debt levels are rising while real estate values and investment portfolios are dropping and it is not difficult to envision an estate falling short of its financial goals. Insurance products can often play a key role in bridging a financial gap, and can even be used to fund Henson trusts.

You will need to consider what type of insurance will provide the best protection for the dollars spent. While individual term insurance may be suitable for a "clean living" (healthy, non-smoking) person, it may not be cost-effective for someone already dealing with health issues. You need to find a balance between cost and coverage, tailored to your client's financial goals and expectations. For instance, does your client plan to pay for large items such as the education and care of a special needs person? These are not only expensive items but require payout over a number of years, so keep this in mind when planning.

Discuss if any children will need to be covered under the policy, if a family term policy may be appropriate or if a universal life insurance product may be more suitable. Because some disabilities are genetically passed, and may not manifest until later in life, you need to know what could reasonably happen to the health, and consequent needs of your client and his or her loved ones, and try to plan for many possible outcomes by choosing the appropriate insurance products and addressing critical illness clauses. Permanent illness needs to be matched with the right insurance product, preferably one that is permanent rather than term based, but I defer to the insurance experts on these options.

As previously mentioned in this chapter, any potential cash that can be left to a person receiving provincial disability benefits must be structured so as not to affect their eligibility for income assistance.

Financial planning, insurance and investment needs are often weighted by concerns about providing for a child with disabilities over the course of the child's lifetime. Insurance products often play a key role in the financial planning to fund, for example, Henson trusts, as well as other options.

From a marketing perspective, almost one in ten people is directly affected by disability issues. This is a very identifiable niche market that is unknown to or ignored by many financial professionals.

Until raised by amendments to the applicable regulations to the ITA, the test was the amount of the personal exemption, which is $10,320 in 2009. If the adult child had income greater than this amount, which virtually all adult children with disabilities do (resulting from provincial disability benefits), he or she was disqualified from a tax-deferred rollover of registered retirement assets.

This test amount was raised in 2003 and indexed, making it greater than disability benefits in all of the provinces; thus, the rollover is achievable subject to other factors which may make such a designation complicated or self-defeating.

Accountants preparing tax returns for special needs clients who do not ask the right questions are particularly at risk. You may know there has been an annual contribution, but this does not mean your job is done when you are preparing the tax return for filing. Knowing but not advising about the implications of beneficiary designations will come back to haunt such professionals in the very near future. The fees they may have earned in preparing the tax return will not warrant claims made for negligent advice. This sort of claim is already coming back to bite the tails of lawyers who did not prepare Henson trusts for clients when they "knew or should have known" that there was a child with disabilities. Most of my estate practice involves sorting out "no trust" estates or advising executors when flawed trusts have been drafted.

One possible result will be that errors and omissions insurance premiums will rise. The courts will hold lawyers and other professionals to the test of perfection and likely find against them without mercy or qualification.

Another possible result will be the liability of the partners of retired professional accountants and advisors and those who find themselves liable as partners of those retired professionals. In the majority of cases that I've dealt with, I have been able to find a "fix" to this problem, by mitigating the damages and putting the estate and beneficiary onside with the provincial authorities. I am now starting to see situations where my best efforts are not enough, and disability benefits and other life supports are being cut off. This is tragic and unnecessary for all concerned.

I have a client situation in which we were able to have a sympathetic judge in a small town actually amend by court order the terms of a will designating insurance to a person with disabilities, but with no Henson trust, thus creating one! This is cutting edge, but it will not be available across the board.

Much to the advantage of the partners of the senior retired solicitor who drafted the will in this case, their liability has ended, and a quantified settlement will be reached with LawPro, the lawyers' indemnity company.

REGISTERED RETIREMENT SAVINGS PLAN (RRSP)

This brings us to the question of designating the RRSP to a Henson trust. This is not presently workable except for IPP owners. Proposed amendments to the ITA which would allow for this have not yet been brought into effect.

An IPP owner, however, is free to have the RRSP transferred over to the IPP by way of an additional voluntary contribution, and then direct the benefits to a Henson trust. This is the ideal solution to the problem.

If a parent designates an RRSP to a child with disabilities, which is very common when a spouse is out of the picture due to death or divorce, there are factors which a professional advisor must consider and discuss with the parent. A Trusted Advisor who places the annual contributions might well know of this designation, while an accountant or lawyer often would not, unless he or she were already aware of the parent's actions, so do not forget to ask the right questions so that no asset is overlooked for planning purposes.

For lower-income families, RRSPs are often a cruel trick played on them by well-meaning financial advisors and institutions. At retirement, drawing on RRSPs may often result in substantial clawbacks of GAINS and OAS income. Every dollar of other income starts to come into the clawback equation for both GAINS (at 50% of each GAINS dollar) and a graduated clawback of OAS at higher levels of income. Trusted Advisors in particular should consider these factors from the client's perspective when also considering their commissions and fees.

What both tax bracket families would like to do is shelter this RRSP asset and have it available at lower rates of taxation or clawback for the benefit of their children with disabilities when they have passed on.

To do so would require that it be "rolled over" to the child or to his or her Henson trust to protect provincial disability benefits. It is common knowledge that such a rollover can be made to a dependent child under age 18, subject to annuitizing the fund and paying it out in equal shares in the years remaining until age 18. For a child over age 18, the rules are less well known.

This adult dependant rollover is now feasible. As a result of federal regulatory changes in 2003 after the budget in February of that year, the financial dependency test (income of the child in the year prior to the death of the parent being less than the personal tax exemption level) that a child with disabilities must meet to allow this rollover has been adjusted upward, and, in the majority of cases, the test can be met.

Foremost is the fact that the rollover of an RRSP in excess of certain limits directly to a child receiving ODSP will disqualify him or her from benefits, and the receipt of funds from the RRSP will again affect benefits. Currently, this appears to be the case in all provinces. Specialized advice is needed to decide on the parent's best course of action.

REGISTERED EDUCATION SAVINGS PLAN (RESP)

Gone are the days when special needs children were simply expected to stay at home with their parents. Nowadays, many special needs children will go on to attend university or college, but those are not their only options, and attendance at alternative educational institutions will need to be appropriately costed out and planned for. RESPs facilitate the saving of funds for such opportunities by allowing your clients to earn investment income in a tax-deferred environment.

Individual plans can be set up for the benefit of an individual beneficiary while family plans accept contributions for more than one beneficiary. While there is no longer a maximum annual contribution to an RESP, the maximum lifetime contribution per beneficiary cannot exceed $50,000. These contributions are not tax-deductible. The federal government provides a grant of 20 cents for each dollar contributed, up to a maximum of $500 each year and a lifetime limit of $7,200. These Canada Education Savings Grants (CESGs) are only paid on the first $2,500 contributed each year and only if an annual contribution is made. A large lump-sum contribution might compromise these grants, but the interest accumulating tax free on a lump sum of $50,000 (presuming, for example, that grandparents decided to endow this amount as an "early" inheritance) would generate much more tax-free growth than the grants provide. This option may be suitable for some of your clients.

Additional grants for families with income below $74,000 are now available. The grant on the first $500 contributed will be 40% for families with incomes below $37,000, and 30% for families with incomes between $37,000 and $74,000. Contributions can be made for a period of 21 years.

RESPs must be terminated by the end of the year that includes the 25th anniversary of the plan.

If your client has chosen to set up an RESP for a special needs child that will attend an alternative to university or college, remember that in order for the funds to be disbursed from an RESP, a facility must be deemed a "designated educational institution" with a "qualifying educational program" under the Canada Student Loans plan. Alternatively, it can be certified by the Minister of Human Resources as an educational institution that provides courses related to the development or improvement of skills in a given occupation or vocation.

A "qualifying educational program" cannot span less than three consecutive weeks. Full-time students must spend at least 10 hours weekly on program-related courses or work, while part-time students must devote at least 12 hours monthly of their time. The in-class portion of a recognized apprenticeship can also count as time spent. Part-time students can access up to $2,500 of RESP funds per 13-week semester, or greater amounts, subject to approval by the plan's administrators.

Curricula can be specifically created to meet the special needs of adult children. For example, a couple of years ago, a group of "exceptional families" in Ottawa arranged a series of approved continuing education classes designed for their 25 children at Algonquin College in Ontario, all of whom had graduated from high school at the age of 21.

Your clients may not be aware of the options available to special needs children; let them know that RESPs can be useful tools for all children, regardless of disabilities. It is just a matter of thinking outside the box and customizing educational needs specific to the person. Even if a special needs child cannot physically attend a classroom setup, he or she may be able to access distance education via correspondence classes, participate via online or study via a variety of apprenticeship programs.

Once the money from the RESP has been distributed to the beneficiary, the income earned in the plan plus the amount of federal contributions is taxed as income of the beneficiary. As a student, the child will not likely have much other taxable income and will be eligible for tuition and education tax credits; therefore, he or she will have little to pay in taxes.

RESP funds should only be used to pay for education-related expenses such as tuition, books and tutors. If a residential or meal plan comprises part of the child's program, it is very important that the plan not be paid with RESP funds. Similarly, RESP money should not be used to pay for things that are covered by provincial disability benefits such as shelter, clothes and food. Inform your client that separate paperwork should be kept so as to clarify the flow of funds in the event of a deemed overpayment, surprise clawback or audit of some kind.

Parents can now have up to $50,000 of the income that accumulates in the RESP transferred into their RRSPs, to the extent that they have unused contribution room available. Alternatively, they can withdraw RESP income and pay tax at their marginal rate plus an additional 20% to offset the interest earned on the grant portion.

It is now possible to roll over or transfer educational assistance payments without tax implications to another family member, so long as the beneficiary is under 21 years of age and is related by blood or adoption. In the case of an RESP in the family plan format, educational assistance payments can be paid out to another family member as long as the same qualifying criteria are followed.

THE BIGGER PICTURE

The advice you provide your clients will often be the trigger that encourages the client to seek further professional assistance, be it for will drafting, trust creation, completion of medical forms, tax filing, insurance designations, powers of attorney, guardianship matters, setting up RDSPs or pension planning. Some clients may have already considered a few of the options you will present to them, but I hazard a guess that very few will ever present an already thorough estate plan; they all need to be constantly tweaked as new laws are enacted, as tax rules change and as their financial holdings vary in value. Periodically, it is worth your while to revisit clients after having completed a comprehensive financial plan, to discuss any new goals and to confirm those already in existence.

Do yourself a favour and build periodic reviews with clients into your work calendar. The more up to date the estate plan and the clearer you and your notes are regarding the planning priorities and current and foreseeable disability-related needs, then the better equipped you are to assist your client and his or her family when life events come to pass, and people you have perhaps never seen before in your life look to you for direction and help during, what can often be, the most trying times of their lives.