



DISABILITY ALERT

DISABILITY ALERT is a commentary on topics of current interest – usually topics relating to planning for individuals with disabilities and changes to current tax and social assistance legislation. Professional advice should be obtained before acting on any of this information.

Disability - Estate Planning Beyond Your Lifetime

When starting any journey it is usually helpful to have a map or a GPS today. Not only does it show you where you are and where you plan to go, it can also provide several options for reaching your destination. Unlike maps that only allow certain choices, estate planning lets you to customize the route you take including undoing previous steps and designing new paths as changing circumstances dictate.

Estate planning doesn't start with the writing of a will. It starts today as you and your family go through the rigours of comprehensive financial planning including retirement planning along with asset management, ownership and distribution of an estate, as well as risk and liquidity assessment and a review of the resulting tax costs. It's a multi-part continuum involving several professions: financial, insurance, legal and investing. Each profession brings an important piece of the puzzle and done right, helps you coordinate a seamless solution generally and for disability in particular.

Disability adds unique challenges to the estate planning process but they are not insurmountable. To start, families need to ponder some very important issues related to their loved one with a disability – how much do they need to live out their life, who will manage the funds, where will they live, how should ownership of the assets be structured and who is going to take care of all of this when you're gone. Of course, you also need to consider if the plan is fair to others in the family including your legal obligations to dependents. A common question is how will siblings and others participate in the plan that you have designed or will they even want to?

Another consideration in estate planning is when your disabled loved one may not be able to manage property on their own because they lack legal competency or owning assets would limit their right to government assistance. Inability to manage property may also preclude your loved one from being able to transfer assets because he/she would not be able to make a will or engage in other legal transactions such as disposing of property. Therefore, asset ownership for the disabled person needs to be handled differently whether the source is an inheritance or gift or even items the person may already own prior to losing capacity. You should be mindful of the potential for conflict between family members and the legal complexity that come into play. As you work through the estate planning process keep in

mind that in many cases a disabled individual could outlive parents by several years. Ask yourself “does the structure that you designed facilitate that and are the documents flexible enough to allow for changes to financial caregivers as you give up those responsibilities?” Or, “has guardianship or power of attorney been put in place to handle financial, tax and legal issues?” Many questions – many issues - important answers!

MANAGING AND TRANSFERRING ASSETS

Most people think that you only have an estate once you die and that it is solely governed by your will. This is not correct. You have an estate right here, right now and it is the total of all you own and owe. This is why estate planning is a life-long process designed to achieve a balance between immediate needs and goals and those that exist longer term including after you pass away.

This recognition leads to the discussion about how you want to own, manage and transfer assets now as well as in the future to preserve and protect them along with the people you intend to benefit. Ownership of assets can be single, joint (with or without rights of survivorship) and “in trust”. Management of assets can be done through powers of attorney for property or by trusts. There are pros and cons to each and they are not direct replacements for each other. In the disability planning realm, trusts can be critical to preserve government benefits and access lower tax rates not to mention protecting the assets themselves

There are two ways to transfer assets. One is an outright gift and the other is “in trust”. In both cases, this can be done immediately or in the future. Even beneficiary designations can be structured to have proceeds go directly to a person following the triggering event or be held in a trust.

HENSON TRUSTS, RDSPs, AND OTHER STRUCTURES

Since I started working with personal finances and disability, I continue to be amazed that the planning can so often be fragmented and lacking in well-defined objectives. For example, Henson trusts are on everyone’s estate planning to-do list but the understanding of their possible uses, beyond maximizing social assistance, is usually overlooked. Also, people continue to open an RDSP without determining how much funds are really needed or whether the account needs a guardian appointed in order to be operated without control by the Public Guardian’s Office.

What is very surprising is that few people do the math to determine just how much capital is needed to fund the financial needs of a disabled loved one now and in the future. Key questions to ask include: “where will the funds come from?”, “how do the various income components fit together?”, and “is there a way to minimize income tax?” In many cases, people simply have wills prepared with little or no additional planning. Query the liability of the lawyer who does a will without the related planning.

GOAL SETTING AND DATA COLLECTION

The most common goals in any estate plan are providing for family and others in a cost-effective and tax-efficient manner. However, these are just very broad goals that could apply to anyone. From here, many specific goals need to be examined such as providing for a special needs beneficiary or how to deal with certain challenging assets like a family cottage.

The data collection part of this exercise can actually help with goal setting, which is why they are grouped together. As you work through developing an inventory of the key people in your life who will be part of the plan in one way or another and listing out assets and liabilities, you will start to get a sense of the issues unique to your situation that may need to be addressed. However, your advisors can assist you with this as well to ensure you do not miss important considerations.

CHOOSING TRUSTEES, EXECUTORS AND OTHERS

Selecting decision makers is a key part of the estate planning process and a task to be taken seriously given the implications. Unfortunately, so often people simply choose the closest family member as a trustee of a trust or executor of an estate. This can and often does lead to disastrous consequences, as well as litigation, if the person selected is not suitable and does not have the emotional grounding or financial competence to do the job. Sometimes this can be improved by having more than one attorney for property, trustee or executor. It is possible to structure decision making such that the trustee, etc., in whom you have the most confidence is be part of the majority approving decisions. However, this gives them what is called “negative” control and it can paralyze decision making. Even worse, if they become a non-resident of Canada, it could change the tax status of the trust or estate and eliminate access to certain tax benefits. Therefore, the most common structure where there are multiple decision makers is a majority decision rule (e.g. two of three).

This is a difficult area and it’s important that you get competent and independent legal advice on this before you make a decision so your wishes will be carried out as you intended. You may even want to consider using a professional trustee either alone or jointly with personal trustees.

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