Recent developments provide greater certainty on disability-related financial measures

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_1 COMMENT

‘The next thing I expect is that [RDSPs] will become ‘designatable,’ and that instead of just the parents being authorized account holders, it will be other family members,’ says Kenneth Pope, a lawyer in Ottawa who specializes in estate planning for people with special needs and disabilities.

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A couple of recent legal and legislative developments have provided financial advisors greater certainty when helping clients plan for family members with disabilities, but there remains widespread acknowledgement that more needs to be done to serve the financials needs of disabled clients better.

On Jan. 25, the Supreme Court of Canada (SCC) weighed in for the first time on the absolute discretionary trust, an estate-planning tool also known as the Henson trust that aims to protect a disabled person's assets, such as an inheritance, as well as that person's right to collect government benefits and entitlements.

The SCC ruled in its decision in S.A. v. Metro Vancouver Housing Corp. that the inheritance left to "S.A." by her father within an absolute discretionary trust was not an "asset" that disqualified her from receiving an affordable rental housing subsidy from the Metro Vancouver Housing Corp.

"What [the Supreme Court of Canada] finally settled, at the national level, is that the assets held in a Henson trust are not the assets of the person receiving provincial disability benefits and affect no other benefits that they receive," says Kenneth Pope, a lawyer in Ottawa who specializes in estate planning for people with special needs and disabilities.

Less than two months later, on March 19, Ottawa introduced a proposal in this year's federal budget to remove the limitation on the amount of time that registered disability savings plans (RDSPs) are permitted to remain open, with accumulated grants and bonds intact, even if someone loses eligibility for the disability tax credit (DTC). Under the existing rules, losing eligibility for the DTC meant that the investor had to close the RDSP by the end of the next year and repay all grants and bonds paid into the plan during the past 10 years. The rule would take effect after the 2020 taxation year if the budget passes.

"Anybody who qualifies for the disability tax credit, in my mind, has to have an RDSP – and now even more so," says Steven Williams, a mutual fund representative and insurance agent with Investia Financial Services Inc. in Calgary who specialized in RDSPs.

This means advisors can have more confidence establishing RDSPs for clients, he says, knowing that these plans aren't at risk of being cancelled each time the Canada Revenue Agency reassesses someone's DTC eligibility.

"[The budget proposal is] excellent," adds Mr. Pope. "The next thing I expect is that [RDSPs] will become 'designatable,' and that instead of just the parents being authorized account holders, it will be other family members."

But while the SCC decision and the budget proposal make it easier to plan for clients who have family members with disabilities, Peter Weissman, partner at Cadesky Tax in Toronto, has a wish list of additional changes he'd like to see made to tax legislation.

At the top of that list is bringing back a strategy that was available until 2016. Under that rule, if a disabled individual was not deemed competent to own property but could live independently, the family could set up an inter-vivos trust to own a home for the individual. However, when inter-vivos trust rules were tightened to prevent foreign home buyers from claiming the principal residence capital gains exemption, people with disabilities living in homes owned through inter-vivos trusts lost that exemption as well.

"What they inadvertently did is they got rid of the planning tool for someone with a special-needs child," Mr. Weissman says. "You can still purchase the home for your child, but if it's sold, it's not the child's home – it's yours ... [Any] increase in value is going to be taxable, and that's money that would be needed to look after the child."

"It was just too broad a stroke of the paintbrush," adds Mr. Pope. "There should be an exemption for people with disabilities who reside in the home owned by the inter-vivos trust, and the reason that this would be fair is that you can still do this for your child with a testamentary trust ... This seems somehow an inequity to me and illogical."

Mr. Weissman and Mr. Pope also would like to see the government revisit the DTC rules. Among other requirements, an impairment must be both prolonged – lasting or expected to last for a continuous period of at least 12 months – and present at least 90 per cent of the time for a person to qualify for the DTC.

"For a lot of people with bipolar disorder, it's episodic but they're always living with it, their family's always living with it [and] they don't know when they're going to have an episode. Same thing with someone with epilepsy," Mr. Weissman says. "[The DTC] was revised several years ago to try to be more inclusive of people with what I'll call 'invisible disabilities,' but they've never gone far enough."

The DTC requirements are critically important because whether someone qualifies for it has implications that go far beyond modest tax savings, says Mr. Weissman.

"The main benefit of the disability tax credit isn't actually the credit," he says. "The disability tax credit is really the key that opens up a lot of tax measures that are geared toward people with disabilities. So, being allowed the credit, even if you're not paying taxes, is very important."

Navigating the evolving legal and legislative landscape to create the best possible plans for clients with disabilities can be complex, but this is an area advisors have no choice but to tackle head-on. After all, as the population ages, the number of people with disabilities is expected to increase.

"When you look at disability planning, you and I will be disabled at some point if we're lucky enough [to live that long]," says Peter Merrick, a financial planner at TheIceSolution.com in Toronto. "This type of planning really applies to everybody."

That doesn't mean advisors have to become specialists in dealing with disability-related issues. Instead, Mark Halpern, chief executive officer and founder of Markham, Ont.-based WEALTHinsurance.com Inc., suggests advisors can position themselves at the centre of a network of experts.

“You don’t have to become an expert in this. You have to be able to talk about it, you have to be able to ask the right questions, and you have to have the right resources to turn somebody toward,” Mr. Halpern emphasizes. “The one thing you can’t do is ignore it. There’s just too much on the line.”