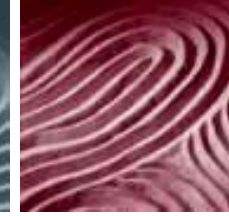


2500, 20 Queen St. West  
Toronto, ON M5H 3S1  
Canada  
Tel. 416.595.8500  
Fax.416.595.8695  
www.millerthomson.com



# MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

TORONTO

VANCOUVER

WHITEHORSE

CALGARY

EDMONTON

WATERLOO-WELLINGTON

MARKHAM

MONTRÉAL

## TAX AND ESTATE PLANNING FOR INDIVIDUALS WITH DISABILITIES

By Rachel L. Blumenfeld

OCTOBER 2003

# TAX AND ESTATE PLANNING FOR INDIVIDUALS WITH DISABILITIES

The December 20, 2002 proposed amendments to the Income Tax Act (the “Act”) and the February, 2003 Federal Budget (the “Budget”) provide individuals with disabilities and their families enhanced tax relief and estate planning opportunities.

## Child Disability Benefit

The new Child Disability Benefit, introduced in the 2003 Budget, provides an additional tax-free benefit of up to \$1,600 to families already receiving the income-tested National Child Benefit supplement to the Child Tax Credit with a minor child who qualifies for the Disability Tax Credit (“DTC”). The first payment is to be made in March 2004 (retroactive to July 2003).

## Disability Tax Credit

In light of the Federal Court of Appeal decision in *The Queen v. Hamilton*, certain aspects of eligibility for the DTC were clarified in the Budget and related draft legislation:

- Individuals who are restricted in either feeding or dressing themselves will continue to qualify for the DTC. **However:**
- The activity of feeding oneself does not include “identifying, finding, shopping for or otherwise procuring” food or preparing food where the activity of preparing is associated with a dietary restriction or regime; and
- “Dressing oneself” does not include the activities of finding, shopping for or otherwise procuring clothing.

## Medical Expense Tax Credit

The Budget proposals also include an expansion of the list of eligible medical expenses for the Medical Expense Tax Credit to include, for example, the cost of voice recognition software for individuals with a physical impairment, costs incurred by individuals with celiac disease who require a gluten-free diet, and the costs of note-taking services used by individuals with disabilities.

## RRSP and RRIF rollovers

The December 2002 proposed amendments and the Budget facilitate the access to the RRSP and RRIF rollovers for certain disabled beneficiaries.

Generally, on death, the full value of property remaining in an RRSP or RRIF at the time of death is included in the income of the deceased in the year of death and taxed in the deceased’s terminal tax return. The Act provides for a number of rollovers of RRSPs and RRIFs, such that the funds are taxable in the hands of the beneficiary. This rollover is available where the RRSP or RRIF is left to a surviving spouse or financially-dependent child or grandchild of the deceased annuitant.

Where the surviving spouse is the beneficiary, the funds may be transferred to his or her RRSP or RRIF, thereby deferring the tax until the surviving spouse withdraws the funds from a RRIF.

Where the financially-dependent child or grandchild was dependent because of a disability, a similar tax deferral is available.<sup>1</sup>

Whether a child or grandchild was “financially-dependent” on the deceased annuitant is a question of fact. However, prior to the Budget, if the child’s income in the year preceding the annuitant’s death exceeded the basic personal amount for that year, the child was presumed to be not financially-dependent. The Budget raised the income threshold used for determining financial dependency of disabled children and grandchildren to \$13,814 for deaths occurring after 2002. (The threshold for other children and grandchildren remains the basic personal amount.)

Where the disabled child’s income exceeds this threshold, financial dependence may still be established, depending on the factual evidence, including:

- the income of the child;
- the cost of living;
- the ability of the child to support himself or herself;
- support provided by others.

Currently, in order to take advantage of the rollover of an RRSP or RRIF to a financially-dependent disabled child or grandchild, the child or grandchild must be the direct beneficiary of the RRSP/RRIF. The rollover is not available if the RRSP/RRIF are to be deposited to a trust. Depending upon the nature of the child’s disability, and whether or not he or she is a recipient of government benefits (in Ontario, benefits under the Ontario Disability Support Program, “ODSP”), it may be however be necessary for the benefits to flow into a trust, rather than directly to the child.

The December 20, 2003, proposed amendments to the Income Tax Act rectify this issue, to a point. The draft amendments to sub-para. 60(l)(ii)(A) of the Act provide that a trust may be named as the annuitant of an annuity purchased with the RRSP/RRIF proceeds, rather than the child or grandchild, provided that the individual (i.e., the financially-dependent child or grandchild) is:

- physically or mentally infirm; and
- the sole person beneficially interested in the amounts payable under the annuity.

This is certainly a welcome development for families with disabled children as the amendment recognizes that funds for disabled beneficiaries must often be held for them in trust. However, in Ontario, for the beneficiary of such a trust to maintain his or her eligibility for ODSP benefits, the value of the capital of such a trust must be limited. The Ontario Disability Support Program Act and related Regulations limit the value of assets that an ODSP recipient may own and the income ho or she may receive from sources other than from the ODSP. An ODSP recipient is permitted to have a beneficial interest in a trust where the capital of the trust was derived from

---

<sup>1</sup> There is also a deferral available for financially-dependent minor children and grandchildren: the RRSP or RRIF funds may be transferred to an annuity for the child to age 18. Tax is payable on the annuity payments as they are received. The annuity payments may be made to a trust for the child.

and inheritance (or proceeds of life insurance) provided that the capital of the trust does not exceed \$100,000 (under the current Regulations). If RRSP/RRIF proceeds are to flow into such a trust, the value of the trust must not exceed the \$100,000 threshold.

Families with disabled children will often establish what has become known as a "Henson," or discretionary trust, for such children. The courts have confirmed that the value of a properly-established Henson trust will not be included in the calculation of the ODSP recipient's assets for purposes of the ODSP asset test. However, the trust contemplated by amended sub-para. 60(l)(ii)(A) of the Act does not qualify as a Henson trust. For ODSP recipients to be able to take advantage of the RRSP/RRIF rollover, then, the value of the benefits received must remain under the \$100,000 threshold.