

## Disability Costs

# Supporting a child with disability: Family law considerations

By **Melanie Battaglia**



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(April 16, 2019, 11:18 AM EDT) -- It is trite that supporting a child with a disability is costly for families. Lawyers should engage the appropriate estate, tax and financial planning professionals to ensure their clients receive comprehensive advice or information when negotiating child support issues arising from the breakdown of their relationship.

### Registered disability savings plan (RDSP)

If the child is eligible for the disability tax credit (DTC) and the parents have set up an RDSP for the child, specify who will be the plan holder in the separation agreement. If a child has been deemed incapable of signing a contract, banks will permit a parent to be the plan holder of an RDSP.

It is important to know that you cannot name an alternate beneficiary of an RDSP (the child is the sole beneficiary of the plan). The RDSP funds are paid out under the *Succession Law Reform Act*, R.S.O. 1990 c. S. 26, as an intestacy (unless the child has capacity to make a will) and in that case, both parents will share it equally.

If you act for the parent who solely contributes to the RDSP after separation and the child predeceases the parents, it is prudent to obtain financial and tax planning advice and negotiate whether the non-contributing parent will reimburse your client from the funds paid out of the RDSP upon the child's death. If this is agreed upon, incorporate these terms into the separation agreement and articulate a clear dispute resolution process for the disbursement of the fund.

### Special expenses

To the extent possible, and considering the child's specific needs, parents should maximize the entitlement to government benefits, and the receipt and/or sharing of these benefits should be clearly addressed in the separation agreement. Special Services at Home (SSAH) (under 18 years) and Passport Funding (over 18 years) provide respite assistance to families supporting a child with a developmental disability, along with funding that can be used for the child's activities including a support worker for the child. It is also important to consider the child's receipt of Ontario Disability Support Program (ODSP) payments for children 18 years of age and older when calculating child support (see, for example, *Senos v. Karcz* 2014 ONCA 459 and *Coates v. Watson* 2018 ONCJ 605).

While most extended health plans cover a portion of certain therapies, including speech and language pathology, occupational therapy, psychology, etc., Applied Behaviour Analysis (ABA) is yet to be recognized as a regulated health profession in Ontario, despite its effective and common use for individuals with autistic spectrum disorder (ASD) and other developmental disabilities.

Accordingly, ABA therapy is not covered under most extended health plans and can be very expensive for families depending on the level of intensity of service that their child requires. It is important to understand the child's clinical needs for the duration and intensity of ABA therapy to negotiate both decision making and child support.

### Estate planning

To the extent possible, address future planning for the child in the separation agreement. Provide for the implementation and ongoing management of any trusteeships, social assistance, income tax benefits, bank and investment accounts, microboards and policies of life insurance. Finally, it is prudent to obtain estate planning advice and ascertain whether you need to specify in the separation agreement that the parents will establish an absolute discretionary trust (Henson trust) in their respective wills for the benefit of the child.

*Melanie Battaglia is a family and education lawyer with Pooranlaw Professional Corporation in Toronto. She has over 10 years of experience in civil litigation and family law matters and has recently expanded her practice to represent children and youth with disabilities in education law matters. You can reach her at [mbattaglia@pooranlaw.com](mailto:mbattaglia@pooranlaw.com).*

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