

The **POWER** of ATTORNEY PROJECT

Tax Information for the Incapacitated and their Substitute Decision Makers

Welcome to the Power of Attorney Podcast which is part of our Conversations that Matter Podcasts. My name is Mary Bart, Chair of Caregiving Matters. This podcast is intended to provide general information only and is not intended to be a substitute for seeking personalized legal, financial or other advice. This podcast raises issues that our audience can further explore on their own in their own local communities with their own local experts. This project will help to be a call to action for families to solve their issues, find solutions to their problems, and have greater peace of mind.

Mary- Our guest speaker today is David Rotfeisch. David Rotfeisch is a chartered accountant and a lawyer who specializes in tax law. So David welcome to our project.

David- Thank you Mary. It's a pleasure to be here. As you know, I am a tax lawyer. I have a national tax practice. Taxpay.com is my website and we specialize in all aspects of income tax and will and estate planning including people who are substitute decision makers so this topic is right up my alley. A lot of this information is not well known by substitute decision makers.

Mary- Well thank you for that and let's get right into our questions. We are excited to learn from your expertise and your wisdom. So my first question is, does being incapacitated affect income tax filing requirements?

David- So you would think that it would but in fact really there isn't much difference for the filing requirements for someone who is incapacitated. If somebody became incapacitated early in the year and they have haven't met the filing date requirements there can be some sort of extension on the filing date but beyond that short term extension there is no difference between someone who is incapacitated as someone who is a regular tax payer. We all have to file our tax returns by April 30th and that means that the substitute decision maker needs to make all the arrangements to get the materials together and have everything ready for themselves or the accountant to file for April 30th deadline. If you miss the deadline except in the unusual circumstances where first somebody just became incapacitated there is an automatic late filing penalty so it's very important to hit that deadline and ideally to pay the taxes and even if you can't pay the taxes owing you do have to make the deadline in order to avoid that late filing penalty.

Mary- My next question then is, are there any special tax deductions for individuals who are incapacitated?

David- Yes, there is a tax credit available for somebody who is incapacitated. In general what you have to do is have a physician fill in a form and that will be presented with the tax documents when the filing is done. So it's very important for the substitute decision maker to make sure that credit is being claimed because the way the Canadian system works is we put forward all of our income and we put forward all the deductions and credits at that time and if we don't take those deductions or credit claims we lose out on them. Now you can go back and refile but it's better to just make the claims and deductions from the start and reduce the taxes owing.

Mary- The next question relates to that and it is, what are the record keeping requirements for a substitute decision maker?

David- Well Mary, as you can tell, it follows right under what we've just been discussing. Because you have to file tax returns for the incapacitated individual you are required to maintain all their tax records which would be things like t3 records for trusts, t4 records for income and t5's for investments and you have to track for assets which have been purchased or sold which give rise to capital gains so you have to keep track of any of those things which contribute or take away from income. Records have to be maintained so if there is for example an apartment building that is owned, all of those records need to be maintained as well. So that would be the rent, expenses related to the property or if there's some sort of business and there may be employees; well all of those things need to be compiled into an income statement and that's going to be taxable so must be taken into account. If it's a corporation then whatever dividends come out of the corporation because then obviously the incapacitated individual will still have whatever income arises from those businesses so all of that information needs to be tracked. In addition medical expenses etc. all need to be tracked and all of those receipts need to be kept and any charitable donation receipts need to be kept. To be short the same things that a substitute decision maker would do for themselves need to be done for the incapacitated person. If the substitute decision maker is not sophisticated enough or not keeping proper records that makes it even worse because they have now a double responsibility so they may want to consider hiring a bookkeeper and or accountant to assist with that task.

Mary- I do want to share with the audience just a personal story about doing the tax credits and filing the annual returns. I was responsible for my mom and dad and I was also their principle care giver and that is such a stressful job on its own. I must tell you at tax time I was so relieved to go to my accountant with all the paperwork I had accumulated over the year and it was an absolute blessing to hand it over to my accountant and say you do all of this because you know how to do this, fill out this forms, just call me when you want me to sign. I called all my siblings and said the accountant is going to charge us money and that's fair because you want somebody to help you and I firmly believe that as we go through the role of being responsible for somebody that you need a team of professionals and really that's the lawyers and accountants. I was so thrilled, so pleased when my accountant called me to say come in and pick it up. It's all done and I was so pleased to write that cheque because firstly, I didn't have the skill to do it and I didn't have the knowledge or the patience to do it and secondly it was done right. So as people listen to you talk, if they take any piece of advice, it's really go find these accountants and lawyers. They will do it right and it really will make such a good difference. So thank you for those two comments.

David- Sorry to interrupt you before you go on to your next question just to let you know I am also in that situation you were in. I am the substitute decision maker for my mother who is incapacitated and I have the responsibility of having her tax return filed and I do have the expertise and ability to do these things myself however, I actually go to an accountant and have the accountant do it. I vet the return but I'm much happier having an accountant do the work.

Mary- Absolutely and when we are in these roles it is such a demanding job and it does often last for years and we don't have to pretend to do all things. I don't do my own tax returns so why not take all the accounting and give it to them. They do it right. People need to know they do not have to do all things and even to the degree that keeping track of how you spend their money throughout the year is so important and if you don't have those skills don't be embarrassed just talk to an accountant or bookkeeper who can help you to figure out a system that works. One lady said to me I am too busy caregiving to even take care of the accounting and that lady in my opinion is setting herself up for so much trouble and so much grief so most people don't like accounting but it has to be taken seriously when we are taking care of it for someone else so get help to make sure it's done well. Buying a little piece of mind is huge.

So my next question is what should be done if there are multiple years of unfiled tax returns?

David- A very common scenario as you already know. The last thing the caregiver wants to deal with is accounting so they don't think about it. It really depends on the exact circumstances. If CRA has not approached the substitute decision maker or the incapacitated on behalf of the incapacitated then what can be done is a voluntary disclosure. Voluntary disclosure forms can be found on canadiantaxdisclosure.com. Voluntary disclosure is a CRA policy that if you come to them before they come to you they will not charge you any penalties, they will not prosecute you and you can often receive a break on the interest. So what happens is you file a voluntary disclosure saying say I have not filed five years of returns and as long as we beat them to the punch then there is no problem. No penalties. If CRA has sent a request to file the returns then you will probably just have to pay the penalties and full interest. You may be able to apply for fairness or taxpayer relief to ask for the penalties to be waived or lowered on the basis of the individual being incapacitated. Certainly it is a lot more complicated to submit the taxpayer relief application and they are backlogged 8-18 plus months and it is obviously time consuming and expensive. The easiest thing is when you become aware of the fact that the incapacitated person has not filed their taxes then give voluntary disclosure through a tax lawyer, and that way it gets everything cleared up.

Mary- Well thank you for that. My next question is what should be done if there is unreported income or unreported offshore assets?

David- Again Mary, a very common scenario. Certainly with immigrants who set up accounts before they come or also people who set up accounts in other jurisdictions regarding various reasons and one of which is tax evasion. That problem does not go away when the individual is incapacitated and unfortunately does not go away when the individual dies either because these assets still have to be dealt with and reported to the CRA. An innocent version of this is for example the UK pension. You may

know UK pensions are not taxable in the UK however are fully taxable in Canada. So there is in itself a tax problem. So anytime you have unreported income you have that same voluntary disclosure available. So if we go to CRA before they come to us and ask about the offshore income, we have no penalties and no prosecution. It's very important to be proactive and take inventory of all assets including those offshore assets and to deal with them appropriately by seeking proper tax advice.

Mary- So perhaps another example would be if somebody has real estate in another country like the US and those kinds of things need to be reported so your worldly assets need to be reported... is that correct?

David- Now that may be true if you have a condo for personal use in Florida say then it does not have to be reported on the T11-35 which is the offshore assets form however, if it is a rental property then it does have to be reported.

Mary- Yes, that's important you see. What it really means is that if you are the substitute decision maker that you have a complete list of the incapacitated assets and if you have a question that you find the appropriate expert or tax lawyer and they'll give you the guidance as to whether that has to be reported so thank you for extending your thoughts on that real estate question that I just asked.

My next question is what happens to unpaid tax debts during the life of the incapacitated individuals?

David- Unpaid tax debts never go away and CRA has extraordinary powers that most people are completely unaware of so if CRA has unpaid accounts owing they can simply just go in and collect them and by collect them I mean they can just seize your bank account, they can seize your pensions, old age security, they can lien your house, they can do whatever they need to do to collect and it can and does get extremely nasty from a collections point of view. So short answer to your question is that the unpaid tax debt during the life of the incapacitated individual has to be dealt with so if there are accumulated or ongoing tax debts as returns are filed you cannot ignore them. What we do is we try to enter into payment arrangements with the CRA collections officer. That will preclude them seizing the bank account or pension. It's very important to be proactive and not wait because next thing you know is that you get a notice that the bank account is closed which is a very nasty situation for the substitute decision maker to be in especially where the incapacitated is say in a nursing home and has to pay say \$2000 a month in fees. Where is that money going to come from if the bank account has been frozen?

Mary- What a nightmare situation to find themselves in. That's a very important point. So my next question is, what happens to unpaid tax debt on death?

David- As I said, Mary, the debt never goes away so death does not extinguish these debts. They have to be dealt with and again the CRA can seize the assets of the estate and furthermore if the executor of the will distributes assets to the beneficiaries while there are unpaid tax debts and before the estate is closed, then the beneficiaries are responsible to pay back those amounts and we have situations in this office where CRA has come back 3-4 years after the death and they are going after the beneficiary for the debt and now this beneficiary has a \$150,000 debt to pay and the money is long gone. They will

seize the account, lien the house, garnish the wages, and so moral of the story is do not distribute any of the estate until the tax situation is cleared up and you have a tax clearance certificate.

Mary- And that's a certificate given by the CRA to the executor I'm assuming?

David- Once all the returns are filed yes. Eventually that certificate will be sent and then you can distribute all the leftover assets to the beneficiaries.

Mary- And that could mean quite a long wait. Families always want the money instantly but really nothing ever happens instantly especially around estates getting finished. People just have to wait and it may take a year or two. Families need to know that. They just can't be spending right away. I hope people are listening to you David because I'm sure people will be raising some eyebrows and saying I had no idea that could happen so David I would like to thank you so much for taking time out of your very busy schedule to join our project. Could you please share your contact information with us?

David- Certainly Mary and it was my pleasure to be here. My main website is www.taxpage.com and as I mentioned I have www.canadiantaxadvocacy.com and my email is david@taxpage.com and that's the easiest way to reach us and of course there are conventional telephones 416-367-4222 but as I say my email is the easiest way to get a hold of us.

Mary- And please for Canadians who are listening, his practice is from coast to coast so if you are in Alberta and you have a question David can answer that for you.

Mary- I would like to wrap up with some closing remarks and that is that Chris Kata, one of our board of directors and I would now like to share a few closing comments.

Chris - Mary, who are our initial project supporters?

Mary – We wish to acknowledge that this project is funded in part by the government of Canada's New Horizons for Seniors Program. Our other initial supporters include Care Connect, The Care Guide, The Healing Cycle Foundation and Scotiatrust. Caregiving Matters is an internet based registered Canadian Charity dedicated to educating and supporting family caregivers. 90% of our work is done online and by leveraging technologies. 10% is done by producing local educational events. We leverage technologies in everything that we do ensuring greater reach and sustainability. I trust that we have given some of the highlights of our exciting new initiative. If you are interested in speaking with me about the project, please let me know. We look forward to your questions and your ideas.

Chris - Mary, if listeners have questions, what is the best way for them to contact us?

Mary Bart- You can contact me directly Mary Bart, Chair of Caregiving Matters at 905-939-2931. My email is mary@caregivingmatters.ca and our website is www.caregivingmatters.ca