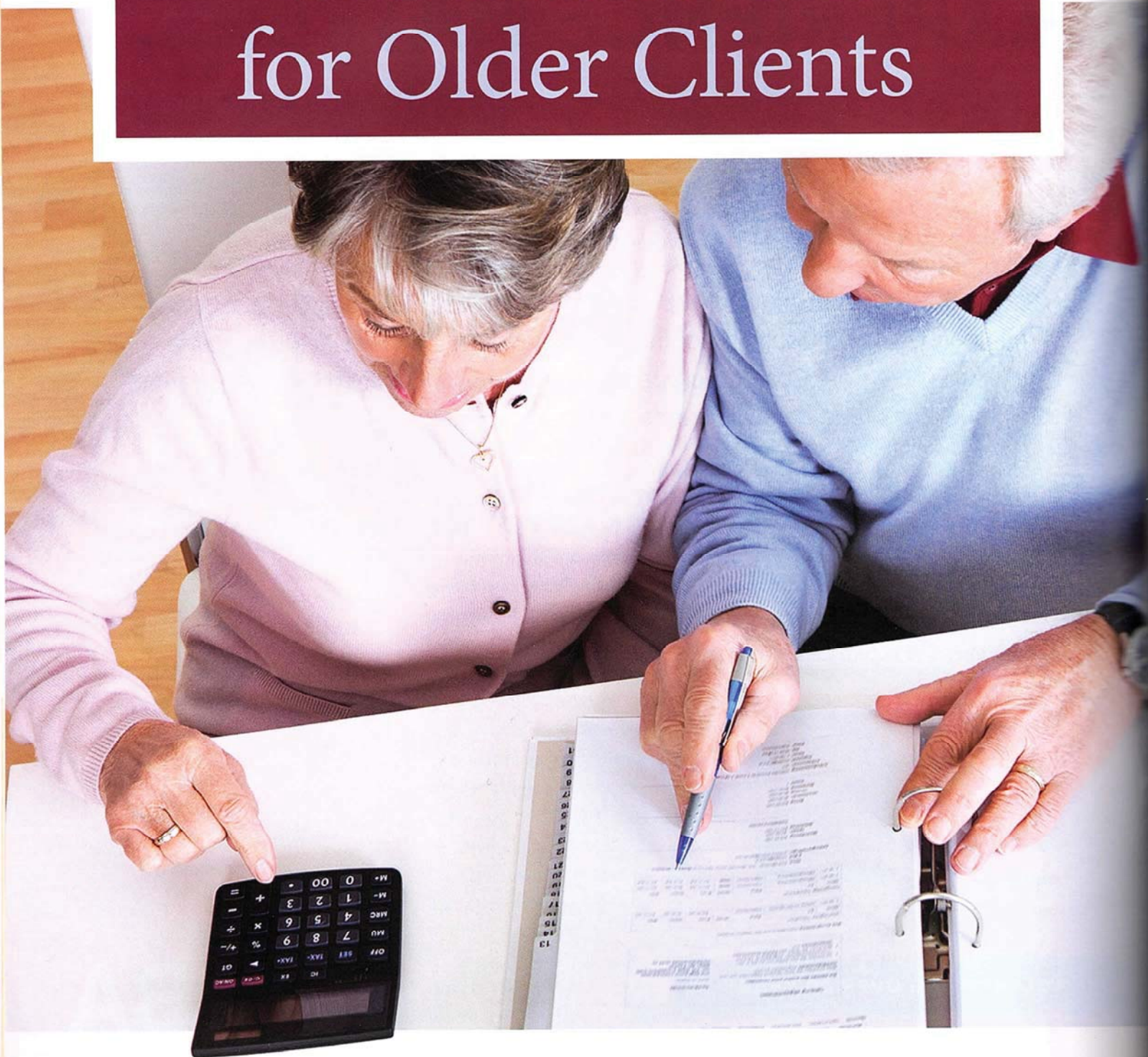


Structured Settlements:

Considerations for Older Clients



BY JESSICA VICKERMAN



Although structured settlements are most often associated with claims involving minor or incapacitated clients, there are many aspects of structured settlements which make them ideal for older clients. As risk tolerance decreases with age, the protection and guarantees offered by structured settlements are of great benefit to older clients, along with the ability to create an individually tailored plan that takes into account both current and future needs.

What is a Structured Settlement?

Put simply, a structured settlement is an alternative to the traditional single, lump-sum payment of damages in cases involving personal injuries or death, whereby a claimant receives a series of periodic or annuity payments over time. Structured settlements were introduced in the 1950s to prevent early exhaustion of personal injury awards, and gained widespread popularity in Canada in the 1980s when the government afforded them tax-free status.

Where a structured settlement is utilized, a lump-sum of damages (typically less than the full amount received by the claimant) is used as a premium to purchase an annuity issued by one of the three life companies presently underwriting structured

settlements in Canada. As discussed in further detail below, the terms of the structure (amount and frequency of payment, term, payment start date, etc.) are subject to considerable flexibility at inception to allow claimants to design a plan which best responds to their personal circumstances.

Guaranteed Income

When it comes to investing, it is often said that time is the best friend of money. Older clients, lacking the requisite “time”, face the greatest investment risks and are particularly vulnerable to economic uncertainty. A structured settlement provides stability and security for older clients as once set in place, the payments and rate of return for the structured settlement are guaranteed and unaffected by fluctuations or downturns in the market. The client can rest assured that their investment is safe.

Structured settlements also provide three levels of payment guarantees not typically available on other conventional investments. At the first level, the life companies that offer structured settlements are subject to stringent government requirements which render the possibility of a default in payment virtually non-existent. Structured settlements are also insured (up to a limit) by Assuris, and in the highly unlikely circumstance that any one of the participating life companies and

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Assuris, together, were unable to make the payments owed, liability to do so would fall to the casualty insurer.

Protection and Security for the Vulnerable

For older clients, the possibility of future incapacity is an important factor to consider when deciding how to allocate an award of personal damages. While a 65-year-old client may be currently capable of managing his or her affairs, the same may not be true for that client in ten, fifteen or even twenty years. A structured settlement can protect aging clients from both themselves and others.

In particular, an aging client with a structured settlement will be unable to inadvertently dissipate the investment principal since, once the structure is placed, the terms of the structure are fixed and the structure is non-assignable (neither the policy nor any proceeds therefrom are capable of being assigned by the owner or the annuitant, collaterally or otherwise); non-commutable (the structure cannot be collapsed for its present-value, lump-sum equivalent) and non-transferable

(neither the policy nor the proceeds may be transferred by the owner or the annuitant, collaterally or otherwise). At the same time, the client is protected from those unscrupulous persons who might otherwise be attracted to a vulnerable individual with access to significant liquid funds.

As the population ages, elder abuse is unfortunately a serious and growing problem, with North American studies indicating that between 2 and 10 per cent of older adults will experience some type of elder abuse or neglect each year.¹ The most common form of elder abuse is financial abuse, which is defined as “any improper conduct, done with or without the informed consent of the senior, that results in a monetary or personal gain to the abuser and/or monetary or personal loss for the older adult” and is most often perpetrated by family members.² A structured settlement will protect elderly clients at risk of financial abuse by preventing the client and/or the client’s family members from accessing the principal investment and depleting the funds. In situations where a lawyer is aware of a

client’s family dynamics which put them at specific risk for financial abuse, the use of a structured settlement for all or part of an award of damages should be strongly considered.

Individually Tailored Plans

A structured settlement allows clients the freedom to design a plan that best suits their personal circumstances. For older clients, many of whom are already financially established, a structure can be designed to complement the client’s overall financial picture and lifestyle. Payments can be fixed or indexed to keep pace with inflation, and lump sum payments can be incorporated to provide for known or anticipated future expenses, such as travel, increased health care and home care costs, home modifications for aging in place, and long-term care.

How and when the payments are received is flexible and can be monthly, annually or at other pre-determined intervals. Payments can last for a specified period of time or for life. For older clients, the purchase of a life plan can mitigate the risk, as life expectancies increase, of outliving one’s money. Depending on their circumstances, older clients may also choose to forego a guarantee to a secondary payee/beneficiary on a life plan in order to maximize payments during their lifetime.

User Friendly and Worry Free

Structured settlements foster financial independence for older clients. With a structured settlement, clients receive a steady income stream without having to worry about overspending or premature dissipation of funds. The payments generated by a structured settlement are received on the same regular, periodic

basis that income and expenses are generally received and paid (typically monthly), making it both familiar and easy to manage.

As the rate of return on a structured settlement is guaranteed, clients with a structured settlement are relieved from having to worry about investment strategies or monitor investment performance. There are also no ongoing financial management fees to diminish the investment returns. What the client sees when they select their structured settlement payment plan is what they get. A structured settlement also guards against investment losses due to mismanagement and poor investment, either by the client or others.

Tax Advantages

The income received from structure payments is exempt from taxation, provided that the conditions set out by Revenue Canada (as it then was) in *Interpretation Bulletin IT-365R2* are met.³

As a result, structured settlements are particularly attractive to older clients who may already be in a high income tax bracket or who would be pushed into a higher bracket by the interest earned on the investment income from a lump sum of damages. For older clients in this situation, structuring their settlement can actually increase the net returns beyond what could be achieved in other conventional investments, without any of the associated risk.

Retirement Planning

For clients who are at or near retirement, the tax-free income provided by a structured settlement offers the “ultimate RRSP” and can be tailored to enhance their retirement financial plan. Structure payments can start

immediately, which may allow older clients to delay withdrawing funds from a retirement account for continued tax-deferred growth.

Alternatively, structure payments can be deferred to a specific age, allowing investment returns within the structure to accumulate tax-free and affording a higher payout upon plan commencement.

Estate Planning

Another aspect of structured settlements which sets them apart from traditional investments and makes them particularly appealing to older clients, is the ability to provide protection against the payment of taxes and/or capital gains upon death.

In many cases, a structured settlement can be set up to provide for a guarantee to a secondary payee/beneficiary (typically a spouse and/or children) who will, in the event of the death of the client during the guarantee period, receive the remaining payments on the same, tax-free basis. Because the structure payments pass to the designated payee(s) directly, they do not form part of the client’s estate, and are not subject to probate.

In effect, the guarantee on a structured settlement can act as a life insurance policy for older clients who, because of age, health and expense, may not have any life insurance available. This can be of particular importance for older clients who have dependants in need of ongoing financial support and protection.

Preserving Access to Government Benefits

The use of a structured settlement may allow older clients to maintain full entitlement to income-based

government benefits such as Old Age Security/Guaranteed Income Supplement (“OAS/GIS”). Where a client earns investment income on the investment of a lump sum of damages, this income will be included when calculating entitlement to OAS/GIS, often reducing the amount for which the client qualifies. Payments from a structured settlement, however, are exempt from this calculation. As such, the use of a structured settlement can help keep an older client’s income below the applicable thresholds and prevent a claw-back of needed benefits.

In circumstances where the client relies on OAS/GIS, the use of a structure can increase the value of a settlement well beyond the actual amount recovered.



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NOTES

¹ See *Elder Abuse Ontario* at www.elderabuseontario.com.

² *Ibid.*

³ Those conditions are generally well known and can be summarized as follows: (i) the damages to be invested must arise as a result of a claim for personal injury or death; (ii) the claimant and the casualty insurer must agree to settle by way of a structured settlement; (iii) the casualty insurer must purchase a single premium annuity contract to produce the periodic payments in accordance with the settlement agreement; (iv) the casualty insurer must be both the owner and the annuitant (beneficiary) of the annuity contract; (v) the annuity contract must be non-assignable, non-commutable and non-transferable; (vi) the casualty insurer must irrevocably direct that all payments be made to the claimant; and (vii) the casualty insurer must remain liable to make the periodic payments required by the settlement agreement.