THE LAWYER'S DAILY

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RESP Ownership

RESP ownership in family law, estate planning

By **Melanie Battaglia and Elisa Mangina**

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(June 24, 2019, 2:21 PM EDT) -- Family law lawyers often negotiate settlements so that both spouses benefit from the distribution of a Registered Education Savings Plan (RESP) to assist with their respective contributions to their children's post-secondary education. It is important that family law lawyers understand the ownership structure of an RESP so that they can ensure that their client, and more importantly the children, are not prejudiced by the arrangement in the settlement, particularly in the case of a family with a child with a disability.

There are some misunderstandings in our jurisprudence regarding ownership of an RESP and whether RESPs form part of net family property. The RESP is property of the person named as the subscriber and is not a trust fund for the children.

More specifically, an RESP has been defined as a contract between an individual (the subscriber) and a person or institution (the promoter). The subscriber contributes funds to the RESP for the ultimate benefit of one or more people (the beneficiary/beneficiaries). The government also contributes certain matching funds under the Canada Education Savings Grant (CESG).

The subscriber can withdraw his or her contributions subject to potential loss of associated CESG funds. It should never be assumed that both spouses are joint subscribers of an RESP or that they can both control the distributions.

If the parents have a child with a disability, they may not agree as to the child's ability to pursue post-secondary studies and the subscriber spouse retains control over distribution of the funds. While the child may have the capacity to assert his or her wish to use the funds for an educational program, ultimately, they have no legal entitlement to the funds.

It is important to obtain tax and financial planning advice on the potential options available to transfer or split an RESP prior to finalizing an agreement and more importantly, the divorce. After divorce, spouses are not eligible to enter into an RESP contract as joint subscribers.

From an estate planning perspective, the RESP forms part of the subscriber's estate, unlike a Registered Disability Savings Plan (RDSP), where the child is the sole beneficiary of the plan.

During the estate planning process, careful consideration should be given to the treatment of the RESP. The definition of "subscriber" in s. 146.1 of the *Income Tax Act* permits another person to acquire the original subscriber's rights as a subscriber under the plan. The drafting lawyer should review the contract between the subscriber and the promoter and note provisions that may be relevant to the treatment of the RESP on the subscriber's death.

In addition, the testator should be aware that since the RESP funds are the subscriber's property and are not held in trust, the successor subscriber may have no legal obligation to use the funds for the beneficiary.

Hence, in some cases it may be preferable to direct in the will that the RESP should be collapsed and the funds fall into the residue of the estate or be paid out to the beneficiary. Although this can mean forfeiting the government's contributions, it may provide more peace of mind that the funds will ultimately flow to the beneficiary.

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