nathens, siegel
BARRISTERS LLP

RESP ABCs: Find Out What It Means To Thee[1]

By Brahm Siegel

A. RESPs – Background and Information

What is an RESP?

A Registered Education Savings Plan or RESP is a tax deferral plan designed to help save for a student's post-secondary education. The contributor to the plan is called the "subscriber"[2]. Any individual can be a subscriber, although most of the time the subscriber is a parent of a future student. The future student is the "beneficiary".

Contributions by subscribers to an RESP are not tax-deductible. All of the income in the account however, compounds on a tax-deferred basis. With the exception of certain annuity contracts, an RESP can invest in mutual funds, government and corporate bonds, GICs and stocks, just like an RRSP.

In addition, there is also the Canada Savings Education Grant or CESG. This is a federal program, introduced in 1998, which deposits up to $500 per year directly into the RESP.

When the accumulated income and CESG is withdrawn from the RESP to pay for education expenses the student pays the taxes, not the subscriber. The full amount of the withdrawal is taxed in the student's hands as ordinary income. The benefit is obvious: in all likelihood, this income will attract little or no tax due to the student's basic personal exemption and tuition/education tax credits.

Who can set up an RESP?

Any individual can set up an RESP for the benefit of a child. Only one subscriber is allowed per plan, unless the subscribers are spouses of each other. Note that while spouses can continue to be joint subscribers to an RESP even after a separation and divorce, if they are divorced they cannot open a new RESP in joint names.

Are There Different Kinds of RESPs?

Yes. There are two types: group plans and individual plans. Group plans are the oldest type of RESP. In this type of plan, contributions of a large number of subscribers are pooled. These pools are professionally managed and generally invested in fixed income investments. When

---

[1] Brahm Siegel, C.S., Nathens, Siegel LLP, November 2010. The writer would like to thank the following lawyers for their contributions to the precedents which appear at the end this paper: Steven Benmor, Gary Joseph, Victoria Starr, Mark Greenstein, Bill Parker, David Jarvis and Shmuel Stern. A special thanks to Ian Millar of BMO Nesbitt Burns for his assistance.

[2] A trust cannot be a subscriber of an RESP. Only individuals can contribute.

the beneficiary reaches a certain age (usually 18) and starts post-secondary education, the RESP contributions are repaid to the subscriber. In addition, a pro rata share of the pool's accumulated income is distributed annually, as a scholarship, to help cover education expenses.

By far more common an "individual plan" is an RESP that is set up for the benefit of one person (called a "single beneficiary plan") or more than one person in the same family ("family plan"). Unlike group plans, individual plans allow the subscriber to withdraw the capital contributions anytime. The subscriber has full discretion over how the plan's assets are invested as well as the timing and amount of education assistance payments. The remainder of this paper focuses on individual plans since these are the RESPs offered by most financial institutions.

Single Beneficiary Plans

In these plans there is only one beneficiary. The subscriber may name anyone he wishes as the beneficiary, including himself, but it is usually the child. The beneficiary may be changed at any time. If the new beneficiary is not a sibling of the first beneficiary, the original beneficiary's contribution history will be applied to the new beneficiary.

Family Plans

In these plans there is more than one beneficiary within a family. Each beneficiary must be related to the subscriber by blood relationship or adoption.[3]

The major benefit of a family plan is that the RESP income does not have to be paid out proportionately between the beneficiaries. If one child does not pursue post-secondary education, the other beneficiary or beneficiaries may use the income and the CESG for their education. There is also less record-keeping with a family plan than with multiple single beneficiary plans.

A subscriber may change a beneficiary if the new beneficiary is under 21 and a sibling of the former beneficiary or related to the subscriber by blood or adoption.

What are the rules about contributing to an RESP?

Up to 2006 there were restrictions on how much money a subscriber could contribute to an RESP[4]. However, in 2007 the lifetime contribution maximum was increased to $50,000 and the annual contribution limit was eliminated. These are the most important but here are some other rules to keep in mind:

- Contributions can be made for no more than 31 years;
- For family plans, no contributions can be made for a beneficiary who is 21 years old or more;
- There is no minimum annual contribution requirement;
- Any money borrowed for an RESP loan is not tax-deductible; and
- The $50,000 lifetime contribution limit is per beneficiary and applies regardless of the type of RESP plan (i.e., it applies to both family and individual plans).

[3] The *Income Tax Act* defines a "blood relationship" as being that of parent and child or other descendants including grandchildren and great-grandchildren. A brother or sister is also considered as a blood relationship. Nieces, nephews, aunts, uncles, cousins and spouses are not considered a blood relationship. Unlike with a single beneficiary plan, the subscriber cannot be the beneficiary in a family plan.

[4] $4,000 per year and $42,000 per lifetime.

Can a child be the beneficiary of more than one RESP?

Yes. Separated parents may choose to open their own RESP for the child or if an RESP has already been opened by one subscriber-parent, the other parent can open her own. However, the total contributions made to these separate plans for that child must not exceed the $50,000 lifetime contribution limit or the lifetime CESG limit of $7,200. If there is an over-contribution, it will be taxed at the rate of 1% per month until the over-contributed amount is withdrawn from the plan.

How does the CESG work?

The CESG was introduced in 1988 by the Canadian government to help ensure that students will have enough money for higher education. The way it works is the federal government pays a grant of 20% of the first $2,500 of annual contributions directly into the beneficiary's RESP. The benefits of the grant reward annual contributions.[5] There is a lifetime limit of $7,200 on the amount of CESG money that any one student can receive from an RESP. Note that the CESG is in addition to the $50,000 lifetime RESP contribution limit.

What happens if a beneficiary does not pursue post-secondary education?

If a beneficiary does not pursue post-secondary education and another replacement beneficiary is not named the contributions are returned to the subscriber with no tax consequences and the CESGs are returned to the government. This has implications for separated families in that if the contributions were made from a joint account but in the name of only one subscriber, only the subscriber will receive all of the unused contributions plus the income accumulated in the plan. Counsel may want to address this in any separation agreement where the plan has significant funds and only one subscriber.

What is an Educational Assistance Payment?

An educational assistance payment ("EAP") is the payment made to an RESP beneficiary to cover a post-secondary education expense. EAPs are comprised of the CESG, the income it has generated, and the RESP contributions.

In order to qualify for an EAP, the post-secondary institution must qualify as an educational program. Most universities, community colleges, CEGEPs, junior colleges or specialized training schools qualify. The program must run at least three consecutive weeks, be at the post-secondary school level, be taken when the student is not earning employment income (excluding part-time or temporary employment to finance studies) and not be taken in connection with, or as part of, the student's employment.

To request an EAP, the subscriber provides the RESP administrator with written instructions requesting than an EAP be made to the beneficiary along with proof of the beneficiary's enrolment at a qualifying educational institution.
The EAP may be used to cover education costs the beneficiary will incur while furthering his or her post-secondary education including but not limited to tuition, lab fees, books, supplies, dental equipment, computers, travel and room and board.

[5] There are also new rules to make RESPs more appealing. For children born after December 31, 2003 in families with less than $36,000 per year of annual income the Government has an additional grant, called a Canada Learning Bond.

For RESPs opened after 1988 EAPs made during the first thirteen weeks of a beneficiary's education are limited to a maximum of $5,000. However, it is possible to apply to the government to have this limit increased under certain circumstances.

What happens if the subscriber or beneficiary dies?

If the parents are joint subscribers, the surviving parent manages the plan. If only one spouse was the subscriber, the responsibility for managing the RESP falls to the executor of the estate (who may or may not be the other spouse). This is a key point for separating couples where only one spouse is the subscriber. Practitioners may want to consider a clause in their separation agreement naming the other as manager of the RESP.

If the beneficiary dies and was a member of a family plan, the RESP continues with the remaining beneficiary (or beneficiaries). If the RESP was an individual plan, the subscriber may name a new beneficiary.

When does an RESP mature?

An RESP matures or terminates upon the earlier of all of the funds having been withdrawn or the end of the year that is the 35th year after the plan is opened.

B. Judicial Treatment – Cases Involving RESPs

A review of the caselaw across Canada involving RESPs results in the following key points, each of which will be considered in some detail.

(i) <u>In General No Obligation To Contribute</u>

The caselaw review begins with the leading principle that in general a spouse cannot force a former partner to contribute to an RESP. Contributing to an RESP may be desirable but not necessary.

The starting point is a 2001 case from the Nova Scotia Court of Appeal called *Gaetz v. Gaetz*[6]. The Court found this type of expense "desirable but not necessary". In his annotation Jay McLeod said the better view was savings accounts are simply outside the scope of s. 7 of the *Guidelines*. Since RESP or other education savings do not fit within any of the enumerated headings of s. 7(1), a court has no discretion to include unlisted expenses. A critical component of both the court and Professor McLeod's analysis is that education fund accounts are savings intended to fund possible future post-secondary education expenses, not expenses that are actually being incurred or will be imminently incurred.

Gaetz was followed in *Wotton v. Banks*[7]. Again the mother asked the father to pay the table amount and contribute to an RESP. Again the request was denied. The court said that to require payment into an RESP was simply another manner of paying child support and unfair to the payor. The court referred to the court's comment in *Gaetz* that an RESP may be desirable but not necessary.

---

[6] *Gaetz v. Gaetz* (2001), 2001 CarswellNS 127 (C.A.).

[7] *Wotton v. Banks* (2001) 15 R.F.L. (5th) 225 (P.E.I.S.C. T.D.).

A similar result ensued in Manitoba in 2003 with *Larosa v. Larosa*[8]. The mother had been paying $65 per month towards an RESP and wanted the father to pay half. The judge noted there was surprisingly little case law on point, examined section 7 and said the only possible category was for expenses for post-secondary education. Again, focusing on the speculative nature of the expense, the court said that an RESP is a plan directed to saving for the *future* costs of post-secondary educational training and that given the ages of the children (13 and 11), a savings plan and life insurance did not fit into the principles of claiming for actual and ongoing expenses as set out in the *Guidelines*. While lauding the mother's prudent savings, the judge referred to *Gaetz,* said the expense "may be desirable but not necessary" and rejected the request that the father contribute.[9]

Larosa was followed in British Columbia three years later in 2006 in *Gold v. Romhanyi*.[10] The judge quoted liberally from *Larosa* in finding that an RESP is a plan directed to saving for the future costs of post-secondary educational training and that given the ages of the children (between 8 and 13 years old) university was many years away and did not fit into the principles of claiming for actual and ongoing expenses as set out in the *Guidelines*.

Although not referred to in *Gold v. Romhanyi* the British Columbia reached a similar result in *Luedke v. Luedke*[11] finding that while perhaps a contribution to an RESP had the "making…for an anticipated expense in the future", at present the wife could not be ordered to contribute to an RESP.[12]

The first Ontario case involving the issue was *Dalgleish v. Dalgleish*[13]. A 2003 case out of Newmarket, the mother asked for the father to create a separate fund to secure the child's future post-secondary education expenses. Magda J. refused to order it, saying: "Although there is some logical appeal for it I am not convinced there is sufficient evidence before the court respecting the numerous factors needed to establish such a fund. The child is just beginning his secondary education. There is no actuarial evidence to establish the present value of a yet-to-be-determined future cost. There are simply too many uncertainties to accede to this request and I must reject it."[14] Although no reference was made to previous caselaw, unlike those cases the child here was actually beginning his post-secondary education, yet still the request was denied.

(ii) <u>Exceptions – Payor Ordered To Contribute</u>

---

[8] *Larosa v. Larosa* [2003] M.J. No. 203 (Man. Q.B.).

[9] Ibid, at paras 30-32.

[10] *Gold v. Romhanyi* [2006] B.C.J. No. 612 (B.C. S.C.).

[11] *Luedke v. Luedke* [2004] B.C.J. No. 1157 (B.C. C.A.) at 25.

[12] Ibid, at 25.

[13] *Dalgleish v. Dalgleish* [2003] O.J. No. 2918 (Ont. S.C.).

[14] Ibid, at 33.

Practitioners who have clients desperate to challenge the mainstream caselaw will find little solace in the caselaw. Only in one case, a 1999 BC case called *McCrea v. McCrea*[15], was the payor was ordered to contribute to an RESP or education fund.

Argued well before *Luedke* and *Gold,* in *McCrea* the mother submitted the father should be setting aside $500 per month to ensure that their 11 year-old's post-secondary education was assured. The father was currently paying for post-secondary education for the parties' other child. The court said that given the age of the child it would be "prudent" to establish an education fund for her[16] and ordered the father to set up a fund for her education. A key difference between this case and the others surveyed so far was that the family had a trust which appears to have made an impact on the judge as he allowed the father to contribute to the fund from the income in the trust. The mother asked that the yearly contribution be $6,000. The court found that excessive and ruled the father only had to pay $250 per month or $3,000 into the fund or an RESP. The court did not order the wife to make the same contributions (presumably because she had always done so and was expected to continue) and ordered the husband to provide her with an annual statement for the account.

Another case where the father was ordered to contribute to an RESP is the trial decision of *Rhynold v. Van der Linden*[17]*.* The child was 14, gifted and junior athlete of the year. The mother had traditionally contributed to an RESP since separation. She had limited resources but the plan was worth over $20,000. The father did not have an RESP for the child or make any contributions to the wife's plan. He was a dairy farmer and post-separation sold his entire milk quota and cattle for a big sum ($1,000,000) netting $324,000 all held by his lawyer.

The father said he would like to contribute an equal amount to the RESP which the court, almost literally, seized on, saying the funds in trust represented an opportunity to secure the child's education. The judge held that given the disposal of his major asset it was "fit and proper" to secure the child's minimum educational requirements and ordered the father to set up an education fund payable out of the cash held by his solicitor with the idea that he would catch up to the mother's total in three years and thereafter match her payments annually.[18]

The father appealed to the Nova Scotia Court of Appeal - and won[19]. The appeals court said the trial judge failed to identify the authority pursuant to which he ordered the establishment of and the ongoing contribution to the educational fund. The court referred to *McCrea* but noted in that case the mother actually asked for a contribution as a section 7 expense: here she did not do so and it was all at the court's initiative. The appeals court also cited the lack of evidence necessary to make the award, noting there was no information about the mother's income or other financial resources. The court concluded the establishment of the fund was not even technically ordered by the trial judge as an extraordinary expense and there was no analysis which would support such an award, even if otherwise permitted by law. While the trial judge's

[15] *McCrea v. McCrea* [1999] B.C.J. No. 1514 (B.C. S.C.).

[16] Ibid, at 77.

[17] *Rhynold v. Van der Linden* [2006] N.S.J. No. 344 (N.S. S.C.).

[18] Ibid, at 28.

[19] *Rhynold v. Van der Linden* [2007] N.S.J. No. 255 (C.A.).

motivation at securing the child's post-secondary future was "laudable", he erred for all these reasons.[20]

(iii) Separation Agreements/Consent Orders

Are the results any different if the parties agree in a domestic contract and/or consent order that each will contribute to an RESP? What do the courts do if this occurs and one party fails to contribute?

In *Crosby v. Crosby*[21] the parties had a separation agreement which provided that the husband would pay $40 per month for each of two children into a Canadian Scholarship Fund until that child turns 18. He failed to pay as agreed and in the context of a variation application the wife asked for the table amount plus $81 per month for an education fund. The court ruled the husband was not required to contribute because it was not properly a child support item as it did not provide for the current needs of the children. The court denied it because the request related to post-secondary education and the children were far from that situation. It may be, the court said, that they will not even pursue post-secondary. The court said that child support is intended to provide for the current needs of the children and does not look to anticipated needs or seek to create monetary funds for the future.[22] The ruling is interesting because in regards to the parenting issues the court paid significant attention to what the parties included in their agreement and did not lightly depart from it. When it came to the RESP, however, the court disregarded the parties' intentions.

The opposite result ensued in *Cook v. McManus*[23] likely because there was a court order in place which had not been complied with instead of an agreement. In *Cook*, there was a consent order providing for each party to pay into an RESP (father $80 per month and mother $40 per month). Three years later the mother discovered that the father had never deposited money into the RESP. She, however, had complied fully and made all the contributions. When the father later brought motion asking to change his child support the mother opposed it and asked for an order that he pay all outstanding sums he should have paid to the RESP. The court agreed with her and in short shrift with no reasons ordered he pay what he should have into the RESP within 120 days.

In a recent Ontario case, *Pandya v. Pandya*[24], the court took the parties' intentions into consideration in dealing with RESPs. The parties had previously consented to a court order which provided that only tuition and textbooks would be paid from the RESP; the rest of the children's post-secondary expenses were to be shared pro rata. One party now asked for further expenses to be paid out of the RESP.

The court rejected the request, holding that while in the ordinary course RESPs can and should be used for all education related expenses, that was not the deal the parties struck. The judge therefore did not interfere with the consent order, ordered certain expenses covered by the

---

[20] Ibid, at 13 and 14.

[21] *Crosby v. Crosby* [2002] S.J. No. 164 (Sask Q.B.).

[22] Ibid, at 16.

[23] *Cook v. McManus* [2006] N.B.J. No. 334 (N.B. Q.B.).

[24] *Pandya v. Pandya* (2010), 2010 CarswellOnt 2475 (Ont. S.C.J.).

agreement to be reimbursed from the RESP with the balance of "non-RESP eligible" to be shared proportionate to income.

In rare cases the court will, instead of approving or declining a request for a contribution, go further and interpret what the parties intended in order to give meaning and structure to some vague principles set out in the separation agreement. This was the case in *L.B. v. P.A.V.*[25] where Langston J. of the Alberta Court of Queen's Bench receives the proverbial gold medal for going above and beyond the call of duty in helping one family.

The parties had minutes of settlement in which they agreed the RESP and trust funds at an investment firm would remain in their joint names for the future post-secondary education and other benefits of the children, to be administered and disbursed only with joint consent. There were two children, one who had finished first year university and the other a few years away. The fund totaled $125,000 initially, $108,000 after the mother used some for the eldest child.

The problem was that although both parents envisioned that each child would benefit from the fund in equal shares they had no roadmap to actually carry this out. Justice Langston provided them with precisely that. She started by setting the balance at $125,000 as of a specific date, which meant that each child's share was $62,500. She then said that all interest earned from that date onwards was to be split equally between the children. She also ordered the parties to provide one another with an accounting of the current balance, the interest received and the withdrawals made for any account held in their name forming part of the fund.

The judge noted that of the son's $62,500 share, $17,000 been used leaving a balance of $45,500. The parties agreed the child's yearly living expenses (including summer) was $17,000. Tuition was a further $9,000, for a total of $26,000. However, since the child had summer employment income there was no reason he should not be making a "reasonable and meaningful contribution" as per *Lewi v. Lewi*[26]. Although it is not clear from the decision, it appears the court deducted $5,000 per year for the child's contribution. The judge then ordered $12,000 per year to be paid out by the RESP/fund for living expenses and the balance, being $8,000 for tuition and books, to be split by the parties proportionately.

An interesting point was that the parties disagreed on how quickly the RESP/fund should be depleted. One parent argued that only tuition and books should be paid out so that most of the money could be saved for *post-graduate* expenses. The other parent thought that was not right and all expenses should be paid from the RESP/fund now.

Justice Langston agreed with the latter argument saying the majority of the funds ought not be preserved for education beyond the first degree, because there was no guarantee the child would attend. During the marriage the parties made a joint decision to save money to their "past detriment" and there was no reason they should now be penalized by treating the fund as free money and ordering them to bear the majority of their children's post-secondary education costs or extending the time for which they may have to provide support.[27]

In some interesting commentary the judge went further, cautioning both the parents *and the child* about what may happen in the future. The court warned the child that if he did pursue further education as he intended, there was no guarantee of continued parental support so he

---

[25] *L.B. v. P.A.V.* [2008] A.J. No. 1174 (Alb. Q.B.).

[26] *Lewi v. Lewi* (2005), 28 R.F.L. (6th) 250 (Ont. C.A.).

[27] Ibid, at 40.

may want to save more and take less from his fund. The parents were warned that that if the child did pursue his goal of becoming a doctor they may both have continuing obligations. In speaking to both sides (parents and child) the judge emphasized that adult children bear a responsibility for their post-secondary education, "especially so" when the parents have already given the child a head-start by saving for this expense, that what is "reasonable and meaningful" is not to be considered in isolation from the parents' means and needs, and there must be a "balancing" between the child's lifestyle and the parents.[28]

This case raises two considerations for practitioners. First, do not expect the courts to breathe as much life into the spirit and intention of the agreement as Langston J. did. Instead, we may all want to put some thought into adding some language or examples in our agreements about how the funds in a family RESP will be allocated between beneficiaries and for what expenses. Second, considering the proliferation of med/arb clauses in separation agreements, it is likely a good idea that disputes in reference to these kinds of issues be subject to dispute resolution clauses, as these issues are well-suited for this type of issue resolution forum as opposed to the courts.

In sum, it appears from the limited caselaw that absent a court order or minutes of settlement, courts can rarely be counted on to enforce provisions relating to an RESP or education fund in a court order. However, if there is a previous court order or even minutes of settlement containing provisions, there is a good chance the court will respect the parties' intentions, order a party to pay who has not or even, as in *L.B. v. P.A.V.,* interpret the terms in a meaningful and purposive way.

(iv) Who Owns The Contributions and Does It Matter When They Are Made?

More and more in practice we are seeing battles over who made the contributions to the RESP, when they were made, and how said contributions impact on the parties' ongoing contributions to the child's post-secondary expenses.

The short answer is that whatever contributions were made to the RESP *during the marriage*, regardless of who made them and in what amount, the total amount will be available for payment of post-secondary expenses with any shortfall to be made up by the parents proportionately, subject of course to a reasonable contribution from the child. The corollary, of course, is that any contributions to an RESP made by a parent *after separation* are generally credited to that parent.

The caselaw begins with a 1999 case from Alberta, *A.S.H. v. S.L.H.*[29]. The mother had contributed about $2,800 into a scholarship trust fund. The parties then separated. The father said this sum should be used for the child's education. The mother opposed the request arguing since she accumulated the savings along the way she should receive full credit for the contributions.

The court agreed with the father, holding that any scholarship trust fund contributions must be deducted from the child's expenses. While the scholarship funds resulted from the mother's savings, the payments to the plan were made while the parties were married, this being the key factor.

---

[28] Ibid, at 55.

[29] *A.S.H. v. S.L.H.* [1999] A.J. No. 1484 (Alb. Q.B.).

A similar result occurred in *MacLean v. Mio*[30]. There were two RESPs, one for each child and both in the wife's name, one worth $3,700, the other worth $5,200. It was the father however, who contributed most if not all of the money to the funds during marriage. As part of a much broader order, the court ruled that each RESP shall be held jointly in trust for the children with the funds in both RESPs being capable of withdrawal only by agreement or further order of the court.

An interesting twist on this issue but with the same result arose in *Hesketh v. Wright*[31], a 2007 Ontario case. The twist was whether available RESP monies gifted by other family members during the marriage (in this case a grandparent) should be applied before pro-rating between the parties. The mother, whose parents had made the contributions, argued they should not be considered. She posited doing so "diminished" the father's obligation to contribute to his daughter's education by relying on the generosity of other family members. The father argued they should be included as monies available for the children's post-secondary education before examining the parties' respective contributions.

The court agreed with the father. Wolder J. held the RESPs were always intended to be gifts to the child *for the purpose of funding her education*. Therefore, they constituted funds available to the child for this purpose. The judge said the issue wasn't about moral obligations, only legal obligations, and ruled that the father must only contribute to any shortfall after the EAPs are made from the RESP.

Courts have been equally consistent, however, when examining cases where post-separation one party makes contributions to the RESP and the other does not. In *Desjardins v. Bart*[32] only the mother funded the child's RESP and she did so entirely after separation. With the child now in university the mother asked the father for a contribution. His response was that his contribution be determined after deducting the RESP. Baltman J. of the Ontario Superior Court of Justice said the RESP should not be deducted from the total expenses because it was funded solely by the wife after separation with her money alone. The only deduction from the total cost of post-secondary education should be a reasonable contribution from the child's summer employment.

The same result ensued in *Woodworth v. Woodworth*[33]. The father claimed a contribution from the mother for the son's post-secondary expenses in the amount of $7,400. The mother pointed to the RESP worth $26,000 and said it should be exhausted before she contributes. The court disagreed, saying since the father was the sole contributor after separation the mother could not rely on these monies to lower her contribution towards the child's post-secondary education.

Although the caselaw on this point seems to be clear, practitioners should take note and ensure they include in their separation agreements that contributions by one party to the RESP will enure to the credit of the party who made them. A corollary to this point is that since RESP contributions up to separation will not be parsed between the spouses, it is wise to include in the separation agreement the value of the RESP at that time so it will be easier to identify thereafter

[30] *MacLean v. Mio* [2010] B.C.J. No. 1569 (B.C. S.C.).

[31] *Hesketh v. Wright* [2007] O.J. No. 584 (Ont. C.J.).

[32] *Desjardins v. Bart* [2006] O.J. No. 3971 (Ont. S.C.J.).

[33] *Woodworth v. Woodworth* [2008] B.C.J. No. 1858.

who contributed what. Counsel may also want to advise clients to open a separate RESP post-separation if they anticipate problems with this kind of issue. Finally, it is good counsel to advise clients to keep records of their contributions.

(v) RESPs and Retroactive Support

Are RESP contributions relevant considerations to a claim of retroactive support? Specifically, can a payor generally deduct from retroactive support obligations what he has paid into an RESP? The answer is, generally, no.

In *D.C v. B.S.*[34] the court noted that without calculating the father's RESP contributions he owed $600. However, when one factored in these payments, he overpaid. The difficulty with this analysis, the court noted, is that RESP contributions should not be deducted from child support payments. Court however declined to order father to pay retroactive amount, finding no appropriate circumstances established to justify child support prior to date of filing application.[35]

Similarly, in *J.(J.L.) v. J.(P.B.)*,[36] years after separation the wife discovered the husband had concealed and misrepresented his income. Strangely, after separation he went out and purchased some $40,000.00 worth of RESPs. The wife made no RESP contributions and suggested that the husband had done this to hedge his potential obligation for retroactive support. The husband took the position that the $40,000 should be deducted from any amount he may owe to the wife. The court disagreed, ordered the RESPs to stay in place until such time as the children need them and said that if they do, consideration would be given at that time to whether the wife should share in the costs of any section 7 expenses.

For a case with a different result, witness *L.F.F. v. K.G.*[37]. The father failed to pay his child support but did pay $56 per month into an RESP. Although the judge did not take this into account for purposes of ongoing support he did for purposes of retroactive support, saying, "As the Respondent paid the full amount of the RESP contributions, presumably without appreciating that this was additional to his other obligations, it seems to me fair to deduct the contributions from the retroactive support owing."[38]

To the writer, this seems like an invitation to payors reluctant to pay support to "load up" on their RESP contributions, as the payor did in *J.(J.L.).* Child support is for a child's day-to-day needs. An RESP is for future savings for post-secondary expenses. It does not seem right to take contributions for the latter to offset failures to pay the former. The better view, it is submitted, is to inform clients that RESP contributions will not be taken into consideration when calculating retroactive child support.

(vi) Power of Courts to Order RESPs to be Transferred To One Spouse or Jointly-Held

[34] *D.C. v. B.S.* [2004] A.J. No. 492 (Alb. Q.B.).

[35] This was before the landmark decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231.

[36] *J. (J.L.) v. J. (P.B.)* (2009), 2009 CarswellOnt 1839 (Alta. Q.B.).

[37] *L.F.F. v. K.G.* [2004] A.J. No. 493 (Alb. Q.B.).

[38] Ibid, at 39.

In a high-conflict case, *B.K. v. A.P.*[39], there was an education savings plan worth $9,500. Although it was in the husband's name the monies were saved while the parties were together and clearly earmarked for the children's education. The wife asked for the plan to be placed in both parties' names so that notice and consent to withdrawal would be required by both. Alternatively, she argued it should be designated as the husband's asset for purposes of equalization. The husband opposed both requests.

The judge said he had no reason to conclude the funds in the plan were at risk (the father said he considered them a "sacred trust") and refused to order they be part of his NFP. They were not transferred to joint names as this would be one more cause for potential conflict.[40]

The case is noteworthy for a second reason. At trial Gauthier J. ordered the mother to pay $5,000 into the children's existing RESP as a remedy for a previous finding of contempt of court, a highly unusual decision. The mother's appeal from the trial decision was dismissed, although it does not appear that one of the basis for the appeal was the RESP-style remedy for contempt.[41]

In *Lysak v. Lysak*[42] the court ordered the father to provide full financial disclosure about RESPs that he collapsed and to provide particulars as to where the net proceeds were deposited.

In *Nahorna v. Nahornyy*[43] the court ordered the RESP account to be transferred to the wife's name because sufficient concern existed that the husband would dissipate said accounts.

(vii) RESPs and Student Loans

Sometimes family law is just a matter of common sense. Just ask the parties in *Drinkwater v. Gilchrist*[44]. Each spouse had an RESP. The mother had exhausted hers but the father still had $20,000 in his. Despite this fact, he allowed children to take out student loans which was baffling to the judge, especially given the children's modest lifestyle and their reasonable contributions from bursaries and part-time employment. Gilmore J. felt the situation was created due to lack of communication between the parties. However, the financial burden of such poor communication should not fall solely on the shoulders of the children.

In a comprehensive, well-thought out ruling, she ordered the father to pay a portion of retroactive s.7 expenses and support from the RESP funds he had set aside and for him to use the balance in the RESP for both children's tuition and books for the next academic year. Finally, she ordered that the balance of the father's RESP shall be used to pay for all of the children's remaining post-secondary expenses for the upcoming academic year insofar as such expenses qualified under RESP rules. In every possible case she ordered that payments shall be made directly from the RESP to a third party (i.e., the university, the university bookstore, landlord, etc.) to ensure that the benefit of such funds was not diminished. She ruled that if there was any remaining balance in the RESP at the end, it must be collapsed with the balance

[39] *B.K. v. A.P.* [2006] O.J. No. 2251 (Ont. S.C.J.).

[40] Ibid, at paras 262-268.

[41] *Korwin v. Potworowski* [2007] O.J. No. 4117 (C.A.).

[42] *Lysak v. Lysak* (2009), 2009 CarswellAlta 2157 (Alb. Q.B.).

[43] *Nahorna v. Nahornyy* (2009), 2009 CarswellOnt 7953 (Ont. S.C.J.).

[44] *Drinkwater v. Gilchrist* (2008), 2008 CarswellOnt 5096 (Ont. S.C.J.).

paid out equally to the children with the intention they use such amounts to pay down their remaining OSAP debt.

Finally, realizing that EAPs cannot exceed $5,000 without special application to the government, she also ordered that in the event that there was any difficulty in applying the RESP for the purposes set out in her order, the father must pay a lump sum of $10,000.00 to each child by a certain date to be used in the upcoming academic year for education expenses or to pay down their OSAP debts, and in full satisfaction of any retroactive claims.

The moral of the story, here, of course is no matter how much you dislike your former partner, do not let your children apply for OSAP until all RESPs are exhausted, especially RESPs built up during the marriage.

C. USEFUL CLAUSES

Set out below are some useful clauses donated by fellow members of the bar (with two from my own files) from various separation agreements, offers and minutes of settlement. If anyone would like these electronically, feel free to contact me. I am, once again, grateful for their help.

1. "It is acknowledged that the Husband deposited $3,000 towards the children's existing RESP after separation. The Husband will forthwith transfer these funds plus any accumulated interest and applicable government grant(s) on those monies, to another RESP account or may otherwise withdraw these funds with accumulated interest on these monies".

Comment: This clause is useful if, after separation, one spouse deposited money to the RESP and s/he wants full credit for same. Note the clause does not state anything about credit so the parties' intentions here remain a bit unclear.

2. "The parties will have equal entitlement to available RESP grants for any given year. In an effort to maximize available annual RESP grants, either party may ask the other to advise by September 1 to confirm their contributions in that year and intended contributions for that year, and shall be able to contribute further amounts, if any, based on that information."

Comment: This clause seems to contemplate that post-separation each party will receive full credit for any RESP contributions but doesn't state what happens if a party contributes nothing, which could lead to problems in the future.

3. "The parties will alternate making annual contributions towards the child's Registered Education Savings Plan (RESP) as well as making a claim for any and all matching contributions (CESG Grant) made by the government as a result of a party's contributions towards the child's RESP in their designated year of entitlement. The father shall have the right to make such contributions as well as a claim for any matching contributions available from the government on account of any contributions made by him in 2009 and in every odd-numbered year thereafter. The mother shall have the right to make such contributions as well as a claim for any matching contributions available from the government on account of contributions made by her in 2008 and in every even-numbered year thereafter. In the year where they have the right to contribute, that party may contribute up to an amount that will maximize the CESG grant. Any contributions over and above this amount will require the written agreement of the other party."

Comment: The clause seems to suggest the parties shall make contributions on an alternating year basis but the reference to "shall have the right" could suggest the contributions are optional.

4. "The husband and wife acknowledge and agree that there shall be no obligation on either of them to make a yearly contribution to the child's RESP, currently valued at $4,800. The manner in which the funds shall be allocated in regards to any post-secondary education for the child shall be determined by the parties at the time the expense arises, and, failing agreement, by the dispute resolution provisions set out below."

Comment: One of my early precedents. Sadly deficient, it would have been far better if it had stated that a party's contribution to the RESP post-separation is a credit to that party.

5. "The husband and wife shall pay equally to any and all post-secondary expenses the child may incur, subject to a reasonable contribution by the child. In the event either party fails to pay his/her half-share, this paragraph constitutes that party's consent to a court order for same on a summary judgment basis, plus costs on a full recovery basis. Notwithstanding this paragraph, the wife shall get full credit for the amount of her two RESPs for the child, totalling $12,000 as her contribution towards the child's post-secondary expenses as she, alone, has paid into these RESPs. If this changes and the husband pays into one of these RESPs or buys his own RESP, he too will get full credit for any contribution(s)."

Comment: Another of my precedents, more recent.

6. "The parties agree to maintain their joint account, account number [xxx]. They both agree to deposit $1,000 per year by December 1 of each year to cover the automatic RESP payments for the Child. They agree to do this for each year, commencing in 2010 and continuing each year until the year 2020."

Comment: The parties intentions are clear here but what happens if a party fails to contribute anything or less than the agreed-upon amount?

7. "The Husband shall immediately set up a Registered Education Savings Plan ("RESP") (or some other investment or trust agreed to by the parties) for each child and contribute $50,000 to each child's RESP. These funds shall be used towards the children's post-secondary education and expenses. If the child does not use the full $50,000 (plus any accrued growth) towards their post-secondary education, the remaining funds in their RESP shall be released to that child upon turning 25 years of age. Should, however, the RESP not adequately cover the post-secondary education expenses, the parties shall share the remaining costs by the Wife paying 1/3 and the Husband paying 2/3, after considering any reasonable contribution by the child. Within 14 days of setting up the RESPs for each child the Husband shall provide proof to the Wife of the establishment of the RESP and that $50,000 has been deposited therein to each of the RESPs. The Husband shall name the Wife as the subscriber of each of the RESPs."

Comment: Not the most tax-efficient clause for purposes of the CESG but perhaps considering the children's ages the parties felt this was the best alternative. Clause is clearly written and provides a good roadmap of what happens if the funds are not used in full. Clause does not provide for what happens if husband fails to set up the RESP.

8. "The parties acknowledge that the children of the marriage have RESPs in their names to which the parties contributed during the marriage. The parties will share equally any reduction in their contributory portion of post-secondary education for contributions made to each child's RESP during the course of the marriage. Any financial contributions made by the

husband or the wife to either child's RESP after separation are a credit to that particular party only and correspondingly reduces the contributing party's financial contribution for that child's post-secondary education in accordance with the amount of their contribution plus applicable interest."

Comment: The best precedent clause of the group. Simple, clear and consistent with the caselaw.