

LEGAL NEWS & VIEWS

R-E-S-P-E-C-T THE R-E-S-P RULES When Preparing your Will

At this time of year when kids of all ages are returning to school, people wonder again "How am I going to pay for my child's post-secondary education?" Registered Education Savings Plans (RESPs) have become a popular answer to that question, especially since 1998 with the introduction of the Canada Education Savings Grant program (CESG). Unfortunately, parents and grandparents who establish RESPs are often unaware that these plans require special consideration when it comes to will and estate planning.

RESPs - The Basics

A person who makes RESP contributions is called a subscriber. The beneficiary of the RESP is generally a student. Subscribers cannot deduct contributions on their income tax returns; contributions are made with "after-tax" money.

Funds deposited into an RESP including CESG grants, however, earn income on a tax-deferred basis.

Payments of income earned and any CESG amounts are termed Educational Assistance Payments (EAPs). Beneficiaries must include EAPs (but not contributions) in their income for the year in which they receive them.

(Further RESP background information is available in the Canada Revenue Agency publication at:

<http://www.craarc.gc.ca/E/pub/tg/rc4092/rc4092-e.html>)

Similarity between RESPs and RRSPs is Misleading

Ownership and control of the RESP remains with the subscriber, while alive, even when the beneficiary qualifies for an EAP. If there is a surviving joint subscriber, he or she becomes the sole subscriber of the RESP by right of survivorship.

Contrary to what one might expect, and unlike an RRSP (Registered Retirement Savings Plan), an RESP does not become the property of the beneficiary when the subscriber dies.

Regardless of who is named as the beneficiary, on the death of the sole or surviving subscriber, the RESP becomes part of the deceased's estate, and must be administered in accordance with the terms of the deceased's Will, if any, or with the laws of intestacy.

Will Provisions can ensure that the intended Beneficiary will reap RESP Benefits

With no directions regarding the disposition of the RESP in the subscriber's Will, it can be argued that the RESP contributions should be withdrawn for the benefit of all beneficiaries of the subscriber's estate - not just the named RESP beneficiaries. This is not likely what the deceased subscriber intended.

More likely, the subscriber intended that the RESP be maintained for the purpose of assisting the specifically chosen beneficiaries to further their post-secondary education.

To ensure that this will be the case, when preparing a Will, an RESP subscriber needs to consider a number of issues, including the following:

- What are the terms of the RESP contract?
- Can one prevent the beneficiaries of the RESP from being changed?
- When and by whom can contributions and income be withdrawn?
- To whom and under what conditions will contributions and income be paid?
- Should funding be provided for on-going RESP contributions?

RESPs not generally considered a Proper Investment by Children's Lawyer

In the absence of specific authorization in the Will, the Office of the Children's Lawyer will likely take the position that they do not consider an RESP to be a good investment of a minor's assets. They generally will not approve of a minor's inheritance being used to continue to make contributions to an RESP.

Address RESP Issues when preparing your Will

The key to ensuring that a deceased subscriber's objectives are met lies in carefully considering the nature of the RESP contract and drafting appropriate Will provisions to give effect to the subscriber's intentions. Professional legal advice on these matters is warranted.

This article was prepared by Joanna J. Ringrose, a lawyer in Oakville who has been practicing in the areas of estate planning and estate administration for over 20 years. This article provides general information only and does not constitute legal or tax advice. For inquiries on this topic, please contact Joanna at (905) 844-5021.



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