LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 7

20TH ANNUAL Estates and Trusts Summit

Litigation and RESPs

Charles Wagner
Mari Maimets
Wagner Sidlofsky LLP

DAY ONE
October 16, 2017

cpd Continuing Professional Development

Litigation and RESPs

Charles B. Wagner and Mari Maimets, Wagner Sidlofsky LLP

Can a judgment creditor compel a judgment debtor/subscriber to collapse a registered education savings plan (RESP) maintained for a child to pay the subscriber's debt? When one of two spouses who are joint subscribers loses capacity to manage property, does the incapable person's guardian of property make the decisions as one of the joint subscribers? Can the other original joint subscriber seek the removal of the guardian of property? When a child is a beneficiary of the RESP and his parent/subscriber dies, who makes decisions about the RESP? Can an attorney for property collapse an RESP to pay for the incapable subscriber's care? Does it make a difference where all of the incapable person's assets are subject to specific bequests in his or her will? Is an RESP a trust? If so, would the rule in *Saunders v. Vautier* be applicable to permit the beneficiary of an RESP to access the funds? If these questions pique your interest you can well understand why the Summit's chairman slotted RESP on DAY I of the Summit for litigators.

First let's review some basic facts about RESPs.

RESPs – Some Key Definitions

What is an RESP?

A RESP is an "arrangement" between a subscriber and a promoter (banks, trust companies,[1] and scholarship funds).[2] The CRA describes an RESP as a "contract" between the subscriber and the promoter.[3] It is a tax-deferred education savings vehicle through which the federal government allows a subscriber to save money for a beneficiary's post-secondary education. The subscriber agrees to name one or more beneficiaries (the future student(s)) and agrees to make contributions for them, and the promoter agrees to pay the contributions, and the income earned on those contributions, to the beneficiary/beneficiaries, subject to the beneficiary's eligibility. If the contributions are not paid out to the beneficiary, the promoter usually pays them to the subscriber at the end of the contract.[4]

RESPs are attractive for two main reasons: they provide tax deferral (subject to certain limitations), and the government contributes grant and/or bond funding made proportionately to contributions (up to a prescribed limit). These features of RESPs are discussed in greater detail below.

---

[1] In order to comply with subsection 146.1(2) of the *Income Tax Act*, the RESP must provide that the plan's property will be held irrevocably by a corporation that is licensed or authorized under federal or provincial law to offer trustee services, and the plan must also specify that its funds will only be used to make educational assistance payments (EAPs), accumulated income payments (AIPs) (after 1997), refunds of contributions, refunds of amounts under the *Canada Education Savings Act* or under a designated provincial program, payments to a designated educational institution, or payments to a trust that also holds property irrevocably under an RESP.

[2] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*Income Tax Act*], s. 146.1(1) (see definition of "education savings plan").

[3] Canada Revenue Agency publication *RC4092 Registered Education Savings Plans*, November 25, 2016 at p. 1, online: < https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/E/pub/tg/rc4092/rc4092-16e.pdf> [*CRA RESP Publication*].

[4] *CRA RESP Publication*, *supra* note 3 at p. 1.

RESPs have no annual contribution limit, but they do have a lifetime limit of $50,000 per beneficiary,[5] and contributions that exceed this amount are subject to a tax penalty.[6]

Since October 28, 1998, all investments held in an RESP must be "qualified investments". If they are not, the education savings plan may lose its registration with the Minister of National Revenue.[7]

Applicable Legislation/Regulations

The primary legislation governing RESPs is the *Income Tax Act*, R.S.C. 1985 (sections 146.1 and 204.9 to 204.94 contain most of the rules for RESPs). The grant and/or bond funding paid into RESPs by the federal government is governed by the *Canada Education Savings Act*, S.C. 2004, c. 26 and the *Canada Education Savings Regulations*. Certain provinces have enacted legislation providing for provincial education savings programs. Ontario has not. Further discussion of provincial plans are therefore beyond the scope of this paper.

Note that unlike registered retirement saving plans (RRSPs) and registered retirement income funds (RRIFs), RESPs are not among the plans contemplated by Part III of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, which pass outside of the estate to designated beneficiaries.[8]

Key Roles

The scope of this paper is restricted to subscribers and beneficiaries of the RESP who are Ontario residents and not U.S. persons.

The subscriber: The subscriber makes contributions to an RESP. The original subscriber to an RESP may be (1) an individual; (2) and individual and their spouse or common-law partner (this is the only situation in which joint subscribers are permitted);[9] or (3) a public primary caregiver. The subscriber may not be a trust, except where the original subscriber has died and the estate of the deceased takes over as the subscriber of an existing plan.[10] The subscriber may be an individual who has acquired a subscriber's rights under the RESP pursuant to a court order or under an agreement relating to the division of property upon a breakdown of a marriage or common-law partnership.[11] The subscriber may also be an individual who has acquired the subscriber's rights under the RESP, or continues to make contributions to an RESP for the beneficiary, after the death of the original subscriber.[12]

The subscriber is the only person who has the legal authority to direct withdrawals from the RESP while they are alive, and the subscriber determines the composition of the withdrawal (i.e., whether the withdrawal is a refund of contributions, an educational assistance payment (EAP)/accumulated income payment (AIP), or a combination (the types of withdrawals are discussed in greater detail below).[13] The

---

[5] Increased from $42,000 in 2007.
[6] For more information in this regard, see *CRA RESP Publication*, *supra* note 3 at p. 4.
[7] Canada Revenue Agency Information Circular No. IC93-3R2, *Registered Education Savings Plans*, May 4, 2016, at pp. 4-5 and 15, online: <https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/E/pub/tp/ic93-3r2/ic93-3r2-15e.pdf> [CRA Information Circular IC93-3R2].
[8] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 [*SLRA*], s. 50 (see definition of "plan").
[9] Some RESPs do not permit joint subscribers: see Basi, Katy, "Treatment of Registered Assets on Death – RESPs and TFSAs", STEP Canada, 17th National Conference, June 18 & 19, 2015 at p. 4.
[10] *Income Tax Act*, *supra* note 2, s. 146.1(1) (see definition of "education savings plan". See also definition of "subscriber".).
[11] *Income Tax Act*, *supra* note 2, s. 146.1(1) (see definition of "subscriber").
[12] *CRA RESP Publication*, *supra* note 3 at p. 3.
[13] Basi, *supra* note 9 at pp. 4-5.

subscriber can transfer the RESP funds to a different promoter or change the beneficiary at any time (subject to limits applicable to group RESPs).[14]

The promoter: The promoter of the RESP is the organization that administers the funds and makes payments from the plan. As noted above, these payments may be in the form of a payment or refund of contributions, an educational assistance payment (EAP),[15] or an accumulated income payment (AIP).

The beneficiary/beneficiaries: A beneficiary of an RESP is a person, designated by a subscriber, to whom or on whose behalf an EAP is agreed to be paid if the beneficiary qualifies under the plan.[16] Depending on the type of plan, the beneficiary may be a designated individual (for an "individual" plan), two or more beneficiaries who are related by a blood relationship or by adoption to the subscriber or original subscriber (for a "family" plan), or a pool of beneficiaries falling within an age-determined group (for "group" plans, which are governed by individual rules regarding eligibility criteria for EAPs, contribution amount and frequency, and consequences of default on the subscriber's obligation to make contributions[17]). The beneficiary under an RESP may also be the subscriber (except for family plans).

It is possible to change the beneficiary under an RESP. Generally, where a "new" beneficiary takes the place of a "former" beneficiary, the CRA will treat the contributions the subscriber had made for the former beneficiary as if they had been made for the new beneficiary on the date they were originally made. Changing a beneficiary creates risk of excess contributions (which are punitively taxed) if the new beneficiary already has an existing RESP to which contributions have been made. In certain limited situations (i.e., where the new beneficiary is under the age of 21 and the parent of the new beneficiary was a parent of the former beneficiary, or where both beneficiaries are under the age of 21 and are connected by a blood relationship or adoption to the original subscriber under the RESP), the contribution history of the former beneficiary is not added to the contribution history of the new beneficiary in the determination of whether the new beneficiary's lifetime contribution limit has been exceeded.[18]

Key Features of RESPs: Tax Deferral and Government Grants

Tax Deferral (EAPs and AIPs)

Contributions made by the subscriber are not themselves tax deductible, but earnings on such contributions are held in what the Canada Revenue Agency describes as a "tax-exempt trust".[19] In other words, the investment earnings generated by the RESP are tax-sheltered for the life of the plan, as long as they remain within the plan.

As long as the income earned by the contributions is paid out of the RESP in **educational assistance payments (EAPs)**, i.e., payments to or on behalf of the beneficiary which help finance the cost of post-secondary education (such as tuition, books/materials, and room and board), they are taxed as "other income" at the beneficiary's marginal tax rate. The promoter may only pay EAPs to or for a student if (a)

---

[14] Basi, *supra* note 9 at p. 5.
[15] See *Income Tax Act*, *supra* note 2, s. 146.1(2)(g.1) (providing that an EAP may be paid to a beneficiary who is enrolled as a student in a qualifying educational program or who is at least 16 years old and a student enrolled in a specified educational program at a post-secondary educational institution).
[16] *Income Tax Act*, *supra* note 2, s. 146.1(1) (see definition of "beneficiary").
[17] For more information regarding group plans, see CRA Information Circular IC93-3R2, *supra* note 7 at pp. 4-5.
[18] *CRA RESP Publication*, *supra* note 3 at p. 4.
[19] *Ibid*.

the student is enrolled in a "qualifying educational program";[20] or (b) the student has attained the age of 16 years and is enrolled in a "specified educational program".[21]

Alternatively, the income earned by the contributions may be paid out as **accumulated income payments (AIPs)**, i.e. payments made to, or for, a subscriber under the RESP who is resident in Canada, where one of the following three conditions applies: (a) the payment is made after the year that includes the 9th anniversary of the RESP and each individual (other than a deceased individual) who is or was a beneficiary has reached 21 years of age and is not currently eligible to receive an EAP;[22] (b) the payment is made in the year that includes the 35th anniversary of the RESP, unless the RESP is a specified plan in which case the payment is made after the year that includes the 40th anniversary of the RESP; or (c) all the beneficiaries under the RESP are deceased when the payment is made.

AIPs are subject to two different taxes: regular income tax, and an additional tax of 20%. AIPs may be transferred to a subscriber's RRSP if the subscriber has sufficient contribution room. The amount transferred to the RRSP is deducted on the income tax and benefit return for the year in which the amount is received.[23]

There are mechanisms available to subscribers which may reduce the amount of AIPs subject to tax (by a rollover, up to a maximum of $50,000, to the subscriber's own RRSP or to a spousal RRSP).[24] AIPs which are paid out to subscribers who have become subscribers under the plan after the death of the original subscriber cannot reduce their tax payable on AIPs. Note, however, that in circumstances where spouses or common-law partners are joint subscribers to an RESP, the death of one spouse or partner does not preclude the other from using the mechanisms for reducing taxes as long as he or she meets certain conditions.[25]

The contributions themselves may be withdrawn tax-free (since they were made after-tax in the first place). The promoter can return the contributions to the subscriber tax-free when the contract ends or at any time before, or the promoter can pay the contributions tax-free to the beneficiary/beneficiaries.[26] Such payments are referred to as a **refund of contributions**.

RESPs may provide for an additional type of payment: payments to a Canadian designated educational institution. Such payments are usually made where there is an amount left in the plan, and the conditions for an EAP or an AIP have not been met. The remaining amount in the plan may then be paid to a designated educational institution in Canada, or to a trust for such an institution.[27]

Government Grants

[20] A qualifying educational program is an educational program at the post-secondary school level, that lasts at least three consecutive weeks, and that requires a student to spend no fewer than 10 hours per week on courses or work in the program.
[21] A specified educational program is a program at post-secondary school level that lasts at least three consecutive weeks, and that requires a student to spend no fewer than 12 hours per month on courses in the program.
[22] This condition may be waived if it is reasonable to expect that a beneficiary under the RESP will not be able to pursue post-secondary education because he or she suffers from a severe and prolonged mental impairment.
[23] If the subscriber receives the AIP in the first 60 days of the calendar year, provided there is sufficient RRSP deduction room, he or she may make the transfer within the first 60 days of the calendar year and claim all or part of the deduction for the previous tax year.
[24] *CRA RESP Publication*, *supra* note 3 at p. 6. See also CRA Information Circular, *supra* note 7 at p. 1.
[25] CRA Information Circular, *supra* note 7 at p. 1.
[26] *CRA RESP Publication*, *supra* note 3 at p. 5.
[27] CRA Information Circular IC93-3R2, *supra* note 7 at p. 10.

The second feature of RESPs which make them attractive is that to certain limits, contributions are eligible for additional government contributions. Canada Education Savings Grant (CESG) payments are contributions the government makes according to a prescribed formula (20% of the annual contributions made to an RESP, to a maximum of up to $500 per year per beneficiary ($1,000 if there is unused grant room from a previous year), to a lifetime maximum of $7,200 per beneficiary). For lower income families making contributions for a beneficiary who is under 18 years of age, the government provides for additional CESGs, as well as additional RESP contributions in the form of Canada Learning Bonds (CLBs), but the details of these payments are beyond the scope of this paper.

CESGs and CLBs are not taken into account when determining if the beneficiary's lifetime limit has been reached or exceeded. If the beneficiary uses the RESP funds for their post-secondary education, the CESGs and/or CLBs are paid out as EAPs. If the beneficiary does not use the RESP funds for their post-secondary education, the CESGs and/or CLBs are repaid to the government.

What Happens to an RESP When the Subscriber Dies?

According to the CRA, when a subscriber dies, the terms of the RESP itself and the relevant provincial law will determine what happens to the RESP.[28] In Ontario, the state of the "relevant provincial law" applicable to RESPs is not completely clear, as will be discussed in greater detail below.

As noted above, the CRA defines RESPs as a "contract" between the subscriber and the promoter. Pursuant to the contract, the promoter agrees to administer the funds and make payments, whether in the form of EAPs, AIPs, refunds of contributions, or payments to post-secondary designated educational institutions. The contract may also stipulate what happens to the RESP when the subscriber dies. Accordingly, the contract should be reviewed as a first step, to determine, among other things, whether it permits the subscriber to name a succeeding subscriber, whether it imposes any requirements on the succeeding subscriber to make a contribution to the RESP in order to assume the full rights of the subscriber, whether it provides that the subscriber's personal representatives become the succeeding subscribers, and whether it places any limits on succeeding subscribers with respect to e.g. the ultimate distribution of the assets in the RESP. Although some plans provide that the RESP automatically terminates on the death of the subscriber, most RESP contracts permit the RESP to continue and for the original subscriber to appoint a successor subscriber.[29] This successor subscriber can be appointed in the original subscriber's will, and the estate trustee would have to ensure that the promoter registers the RESP in the name of the successor subscriber. Furthermore, the *Income Tax Act* provides that a person making a contribution into the RESP following the original subscriber's death will automatically become a successor subscriber.[30] If no successor subscriber is named in the will, or is the estate makes a contribution to the RESP, the estate becomes the successor subscriber.[31]

Pursuant to the definition of RESPs as a contract, the contractual rights of the subscriber under an RESP are usually treated as the subscriber's personal property.[32] The Ontario Ministry of Finance takes the view that upon the subscriber's death (and assuming that there is no surviving joint subscriber), the part of the RESP to which the subscriber is entitled will be included in the subscriber's estate and the value of the

[28] CRA Information Circular IC93-3R2, *supra* note 7 at p. 3.
[29] Basi, *supra* note 9 at p. 13.
[30] *Income Tax Act*, *supra* note 2, s. 146.1(1) (see definition of "subscriber").
[31] Basi, *supra* note 9 at p. 13-14.
[32] See Basi, *supra* note 9 at p. 1.

RESP is included in the value of the deceased's estate for the purpose of calculating estate administration tax.[33] If the subscriber's surviving spouse was a joint subscriber, the RESP ***would not*** be included in the deceased's estate for the purpose of calculating estate administration tax because the rights in the RESP would pass directly to the joint subscriber. The part of the RESP to which the subscriber is entitled does not belong to the RESP beneficiary. Accordingly, a deceased beneficiary's estate has no claim to the RESP (a deceased person cannot qualify for payments out of the RESP). It goes almost without saying that any contributions made by the government are repaid to the government and do not pass to the deceased subscriber's estate.

A fairly recent family law case from the Ontario Superior Court of Justice (*McConnell v. McConnell*,[34] discussed further below) has conceptualized RESPs as trusts. The court came to the conclusion that as long as the requisite elements of an express trust are proven, an RESP may be characterized as a trust set up by the subscriber(s) for the benefit of the beneficiary/beneficiaries. Pursuant to this characterization of RESPs as a trust, the subscriber is the settlor and trustee, and the designated beneficiary is the beneficiary.[35] The funds held in an RESP are conceptualized as property held for the benefit of the beneficiary and not as property belonging to the subscriber. The conclusion in *McConnell v. McConnell* requires estate planning professionals to consider the possibility that property held in an RESP may not form part of the subscriber's estate. We will examine this case in more detail in the next section.

McConnell v. McConnell

Estate planning professionals are well-advised to take note of the decision of Price J. of the Ontario Superior Court of Justice in *McConnell v. McConnell*.[36] While this case is not the first to treat an RESP as a trust,[37] it is a case that cannot easily be restricted to its particular facts, and for this reason, it has made the law regarding the treatment of RESP property after the subscriber's death uncertain.

The facts of the case, briefly, are these: Kevin and Mary-Patricia McConnell were married with two children of the marriage: Curran, aged 18, and Aidan, aged 14. After 17 years of marriage, Kevin separated from Mary-Patricia to form a relationship with another woman. From the time of their separation, Kevin underpaid child support, paid no spousal support, and did not contribute to Curran's educational expenses (Curran had just started undergraduate studies at Dalhousie University). Part of Kevin's reasoning for why he had not made these payments was that there was an RESP capable of funding at least part of Curran's education costs. Mary-Patricia stated, however, that Kevin had been failing to cooperate to allow her to access the funds in the RESP, which amounted to approximately $76,000 (the RESP had done well through

---

[33] See Ontario Ministry of Finance, "Frequently Asked Questions", *Estate Administration Tax*, online: <http://www.fin.gov.on.ca/en/tax/eat/faq.html#Q26>.
[34] *Infra* note 36.
[35] See *McConnell v. McConnell*, *infra* note 36.
[36] 2015 ONSC 2243.
[37] See *England v. Nguyen*, 2015 MBQB 139 (a family law case in which the mother had been ordered, at the conclusion of the third of three trials, to repay a portion of certain RESPs to her two children. The father had been designated, by the court, as the "trustee" for the RESPs, at the conclusion of the second trial. The mother had later transferred the RESPs into other forms of investments. The court held she had to return the money. This case is easily restricted to its facts.). *Contra Stones v. Stones*, 2002 BCSC 1558 (in which the British Columbia Supreme Court found that there was no express trust and no constructive or implied trust in an RESP set up by a mother for her daughter, but in which the court did find a breach of fiduciary duty when the mother withdrew funds from the RESP in contravention of a court order ordering the mother to hold the RESP for the daughter for her university education); *RKK v. BMM*, 2017 YKSC 35 (in which the court found that the daughter had no proprietary interest in the RESP, that the mother was the legal owner of the plan, and that she was therefore within her rights to cash in the plan and use the money to take herself on holiday to Vienna).

the investment of family funds through the course of the marriage). She moved for interim support, and for an order removing Kevin's name from the children's RESP, to enable her to access its contents to pay the expenses of Curran's studies in Halifax. For the purposes of this paper, we will focus only on the RESP issue.

The court characterized Mary-Patricia's motion regarding the RESP as a motion for the removal of Kevin "as a joint trustee from the RESP that she established for the benefit of Curran and Aidan."[38] Price J. found that Mary-Patricia had opened the RESP when Curran was 6 and Aidan was 3, and that she had been the only contributor. She had added Kevin as a joint trustee in order to enable him, in the event of her incapacity, to manage the funds for the children's education. Kevin had never had any actual involvement in the administration of the RESP. Price J. found that there had been a breakdown in communication between Mary-Patricia and Kevin, which had prevented, and was likely to continue preventing, the accomplishment of the RESP's objectives.

In describing what an RESP is, Price J. acknowledged the usual definition of an RESP as a "contractual arrangement between a 'subscriber' and a 'promoter'."[39] He held, however, that an RESP was not property belonging to or in the possession of either spouse.[40] He went on to hold that if the court can infer with certainty that the parent opening the RESP had the intention to create a trust, then the funds would be impressed with an express trust, because they are paid by the settlor/subscriber for the specified purpose of the children's education.[41]

The court articulated the consequence of its finding regarding the characterization of an RESP as a trust as follows: "Where parents seize R.E.S.P. funds after the account has been constituted, they run the risk of being removed as a trustee and of being found liable for breach of trust."[42] The court ordered that Kevin be removed as joint subscriber.

The court did not get into any discussion of whether the trust in that particular case might be a revocable trust (i.e. a trust which would permit the settlor to retain sole control over the trust, to withdraw funds from the trust, or to alter or cancel the trust at any time). The court seemed to take it for granted that the settlor retains a reversionary interest in the trust if the objects of the trust fail because the beneficiary does not attend a post-secondary education program. The question of the precise nature of an RESP trust is now a live one, given the explicit statutory and contractual rights of a subscriber to take refunds of contributions and AIPs: what precise circumstances will deprive the subscriber of these default rights?

If *McConnell* is correct, and the RESP is a trust outside of the estate, query whether the value of the RESP is deemed to be part of the estate for the purposes of section 72 of the *SLRA*. If this question is answered in the affirmative, it means that a dependant who brings an application for support under Part V of the *SLRA* can seek to have the money in the RESP used to fund support under section 72(1)(e) of the *SLRA*. It also means that when the beneficiary of the RESP has issued and served the application for support on the personal representative of the deceased, the distribution of the estate (arguably including the RESP) has been stayed until a disposition of the application.[43]

---

[38] *McConnell v. McConnell*, *supra* note 36 at para. 116.
[39] *McConnell v. McConnell*, *supra* note 36 at para. 119, citing Carey, Florence, "R.E.S.P.s and Estate Planning" (2008), 27 Est. Tr. & Pensions J. 124.
[40] *McConnell v. McConnell*, *supra* note 36 at para. 118, citing *Canada Education Savings Act*, S.C. 2004, c. 26.
[41] *McConnell v. McConnell*, *supra* note 36 at para. 123.
[42] *McConnell v. McConnell*, *supra* note 36 at para. 124.
[43] *SLRA*, *supra* note 8 s. 67.

How Might RESPs Frustrate an Estate Plan or Give Rise to Estate Litigation?

There are several ways that an estate plan might be frustrated, or subject to challenge in litigation, if the RESPs to which the testator was a subscriber are not carefully dealt with in the testamentary document or continuing power of attorney.

What Happens if the Testator's or Incapable Person's Debtors Seek Payment?

Section 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***") states that property held by a bankrupt in trust for any other person shall not be included in the property of that bankrupt that can be divided amongst his or her creditors.[44] Based on the holding in *McConnell v. McConnell*, a subscriber to an RESP who owes debts to third parties seeking payment may try to avoid having to collapse the RESP in order to pay the debts, if he or she can make a case that the elements of an express trust were present when the RESP was set up.

On the other hand, creditors may not be dissuaded by the debtor's attempts to avoid paying, based on section 67(1)(d) of the *BIA*, which states that the property of a bankrupt shall include "such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit."[45] The creditors faced with a reluctant debtor attempting to use *McConnell v. McConnell* to escape having to collapse an RESP to satisfy their debts will want to attack the argument that the RESP is an express trust to which the debtor/subscriber has lost their rights.

The creditors' counter-arguments will find support from the holding of the Alberta Court of Queen's Bench in *Payne, Re*,[46] in which the court analyzed the terms of the RESP contract, and determined that the RESP was not a trust entitling it to protection from creditors pursuant to section 67 of the *BIA*. The court found that under the contract:

- The subscriber was entitled to the return of funds plus interest at any time prior to the date of maturity;
- The subscriber had the right to assign the right to receive the principal amount to any person, for any purpose, including as collateral security for a loan;
- The subscriber had the right to substitute another student for the original student up to the date of maturity;
- The promoter was required to pay all deposit funds to the subscriber in the event the plan was terminated earlier than the date of maturity.

Because it was clear, based on the terms of the contract, that the bankrupt was not holding title to the plan for the exclusive enjoyment of her sons, and had the authority to cancel the plan at any time and obtain a repayment of her principal and interest, the requisite elements of a trust were not made out and the property was available to creditors.

Of note, the court in *McConnell v. McConnell* did not go through any analysis of the terms of the RESP contract in coming to its conclusion that the RESP in that case was a trust. Litigators wishing to rely upon,

[44] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 67(1)(a)
[45] *Ibid*, s. 67(1) (d).
[46] 2001 ABQB 894.

or distinguish, *McConnell v. McConnell* will want to carefully review the terms of the RESP contract itself to ensure whether those terms might defeat any argument regarding an express trust.

What Happens if the RESP Beneficiary Wishes to "Bust the Trust"?

If the RESP beneficiary wishes to access the funds (either before or after the subscriber's death or incapacity), he or she may wish to consider using the rule in *Saunders v. Vautier*[47] to try to do so.

There will be impediments to such an argument. First of all, the beneficiary will have to establish that a trust existed in the first place. Second, the beneficiary will have to deal with the fact that the *Income Tax Act* and the terms of the RESP itself only permit the promoter to pay out funds in the form of a refund of contributions, EAPs, AIPs, return of grants to the government, and payments to designated financial institutions. Assuming that he or she meets the eligibility requirements stipulated by the plan and the *Income Tax Act*, the beneficiary might successfully argue that he or she ought to be entitled to the contributions and to EAPs. However, if the beneficiary does not meet the eligibility requirements stipulated by the plan and the *Income Tax Act*, the beneficiary will be in a poor position to advance any claim to the funds in the plan; in our view it is more likely that a court would find that the express trust has failed, and that the trust property reverts back to the settlor (the subscriber) in the form of a refund of contributions and payment of AIPs (with grant moneys being returned to the government).

Power of Attorney for Property

If a subscriber becomes incapable of managing his or her property, the treatment of the RESP might become subject to litigation if the subscriber's continuing power of attorney for property does not address the RESP, or if the subscriber's attorney wishes to use the RESP property for the incapable subscriber's benefit but a beneficiary of the RESP challenges the attorney's decision.

Taking the first example, if the subscriber's continuing power of attorney for property does not address the RESP, the attorney might be challenged by interested third parties (such as the incapable person's dependants, or residuary beneficiaries under the will) if he or she decides to keep making contributions to the RESP from the incapable person's assets. In our view, such challenges are more likely to be successful if the challenger can show that the funds used for RESP contributions ought to have been used for the incapable person's support, education and care, or for that of the incapable person's dependants, or where the funds ought to have been used to satisfy the incapable person's other legal obligations.[48] If the incapable person has sufficient assets to cover these required expenditures, then in our view such challenges are less likely to succeed.[49]

What happens if all of the incapable person's property, except an RESP, are subject to specific bequests in his/her will, and the attorney has to get funds from somewhere to pay for the incapable person's support, education and care, or for that of the incapable person's dependants? In that case, section 35.1 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "***SDA***") provides some guidance. As long as the assets subject to specific bequests are not money (in which case the guardian is free to dispose of it), they may only be disposed of if the disposition of the property by the guardian is necessary in order for the guardian

[47] (1841), 49 E.R. 282 (Eng. Rolls Ct.). The rules in *Saunders v. Vautier* permits beneficiaries who have reached the age of majority and who are of sound mind, and who represent the full beneficial interests of a trust, to terminate or to vary the terms of the trust.
[48] See *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [*SDA*], s. 37(1).
[49] Section 37(3) of the *SDA*, *supra* note 48 permits the guardian to make gifts to the incapable person's friends or relatives.

to comply with his or her duties.[50] If the RESP is not subject to a specific bequest in the will, then the attorney or guardian may collapse it in order to access the funds.

What if the attorney wishes to collapse the RESP to use the funds for purposes other than "required expenditures" under section 37 of the *SDA*? The RESP's beneficiary will certainly wish to consider challenging this decision. The first steps we would recommend for the beneficiary seeking to challenge the attorney's decision would be to gather any evidence that will support the argument that the holding in *McConnell v. McConnell* ought to be applied. This would include reviewing the terms of the RESP contract, as discussed in detail above, and gathering evidence regarding the subscriber's intentions and the circumstances in which the RESP was set up. If it can be argued that the requisite elements of an express trust were present when the subscriber initially set up the RESP, thereby creating an express trust and entitling the beneficiary to the benefits conferred under the RESP, there is a basis for challenging the attorney's decision to collapse the RESP.

Where the subscriber's intent with respect to the purpose of the RESP and its intended "beneficiaries" at the time the RESP was created cannot be clearly ascertained from the available evidence (i.e., where it's not clear that the subscriber intended only to benefit the designated beneficiary/beneficiaries, and that he or she did not also intend to be able to withdraw contributions for themselves and/or to take AIPs), the challenge is less likely to be successful. If the continuing power of attorney for property is clear as to the incapable person's intentions for the use of the RESP (e.g., if it spells out that the RESP property is not to be touched unless it is directed to the designated beneficiary/beneficiaries, or if it spells out that refunds of contributions or AIPs may only be taken in accordance with section 37(1) of the *SDA*), then this may help avoid litigation because the incapable person's intentions are clear. Recall that section 37(4) of the *SDA* provides that gifts to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.[51]

In order to mitigate against the risk of litigation, estate planners should consider:

- Inquiring into the factual situation that surrounded the creation of the RESP, to ascertain whether the beneficiaries would have any viable claim under an alleged express trust if a challenge were to be made;
- Recommending that the subscriber's spouse be added as a joint subscriber, if the circumstances are appropriate for doing so;
- Ensuring that the continuing power of attorney specifically addresses the RESP, and in particular:
    - Should contributions continue, and if so, at what rate and frequency;
    - Under what circumstances should the attorney direct refunds of contributions to the incapable person rather than to the beneficiary, or vice versa;
    - Under what circumstances should the attorney take an AIP, and what measures should be taken to minimize the associated tax consequences; and
    - Under what circumstances should the attorney transfer the RESP to a new beneficiary?[52]

Will

[50] See *SDA*, *supra* note 48, s. 35.1(3) (a).
[51] But see *SDA*, *supra* note 48 at s. 37(1) (a guardian of property is required to make expenditures that are reasonably necessary for the support, education and care of the incapable person's dependants).
[52] See generally Basi, *supra* note 9 at 8ff.

As with a continuing power of attorney for property, estate solicitors drafting wills for testators who are subscribers to RESPs should consider inquiring into the factual situation that surrounded the creation of the RESP in order to ascertain whether the beneficiaries might have any viable claim under an alleged express trust, although by the time an estate solicitor becomes involved it may be too late to do anything about it.

Consideration should be given to appointing the testator's spouse as a joint subscriber, if the circumstances are appropriate for doing so, in order to prevent the RESP from passing into the estate in the first place.

If the RESP will have to pass into the estate, then in order to mitigate against allegations that the will does not adequately set out the testator's intentions regarding the RESP, recommendations made by Katy Basi in her paper entitled "Treatment of Registered Assets on Death – RESPs and TFSAs"[53] bear repeating. The will could address the following matters in a clause appointing a testamentary trust as successor subscriber:

- How the trustee should manage the RESP on an ongoing basis (e.g. investment policy, annual limits on payments out of the RESP, educational programs or institutions that are considered acceptable or unacceptable by the original subscriber, etc.),
- Whether contributions to the RESP should be accepted and, if so, from whom (as a contributor becomes a subscriber of the RESP, with all the power that this entails),
- A waiver of the application of the even hand rule with respect to the RESP (assuming that this is the intent of the original subscriber),
- Limitations on who can be a beneficiary of the RESP,
- Direction re whether a new RESP may be opened, or whether an existing RESP may be transferred to a new or existing RESP,
- The discretion to collapse the RESP "early" if necessary, and the distribution of the RESP funds if this occurs,
- When the RESP should terminate, and the distribution of any funds leftover in the RESP at this time, and
- The ability to make contributions to the RESP from the estate or from other trusts established pursuant to the will.[54]

The estate solicitor should be careful to properly advise the testator of the consequences of having the RESP fall into the residue of the estate: if it does, and the residue is to be distributed in a manner that is inconsistent with the terms of the RESP contract and the provisions of the *Income Tax Act* for distributions of the RESP's income, then the RESP may have to be terminated, CESGs/CLBs may need to be repaid to the government, and heavy tax penalties may apply to the income withdrawn. If the testator is a subscriber to more than one RESP, each of which have different balances, but the residue of the testator's estate is to be divided equally amongst his or her beneficiaries, then the RESPs may have to be terminated to equalize the estate among the beneficiaries, which may carry the negative consequences set out above. If the will names residuary beneficiaries different from the beneficiaries appointed under the RESP, then the testator's intentions regarding the RESP assets may end up being frustrated, leading to a claim in solicitor's negligence.

If the will appoints a trust company as executor, then serious consideration should be given to appointing a successor subscriber, because the trust company may refuse the responsibility of becoming the successor subscriber to an RESP.

Estate solicitors would be well advised to consider including an RESP clause in the will which addresses:

---

[53] *Supra* note 9.
[54] Basi, *supra* note 9 at pp. 15-16.

- The appointment of a successor subscriber for all RESPs held on death – with consistent information on file with the promoter;
    - If a successor subscriber is appointed, depending on the terms of the RESP contract, that person would have full authority over the RESP from that time onwards, and any other instructions in the will would be non-binding. We note that this may give rise to litigation if the RESP's beneficiaries feel that the successor subscriber is dealing with the RESP in a manner that undermines the beneficiaries' interests. To mitigate against this risk, the will may transfer the RESP to a parent or a lawful custodian who is to hold the RESP "in trust" for the specific beneficiary.
- The will can allow the executor to appoint a successor subscriber in their absolute discretion;
- The will can provide that a testamentary trust be named as successor subscriber. In this case, the will can be very specific with respect to the instructions to the trustee regarding the administration of the RESP.[55]

Conclusion

Takeaway For Solicitors

RESPs are, first and foremost, creatures of statute and of a contract between a subscriber and a promoter. There is some case law that suggests that they may also be trusts, if the evidence shows that the requisite elements to create a trust were present when the RESP was created. In order to ensure that the subscriber's intentions with respect to the RESP are carried out, and to minimize the risks and consequences of litigation, the estate solicitor will need to develop an understanding of the circumstances giving rise to the RESP's creation, and the client's intentions with respect to how RESP funds will be maintained in the event of incapacity, or distributed in the event of death. Given the potentially expensive consequences of having the RESP pass into the residue of the estate, it may be wise for the estate solicitor to consider an RESP clause in the will which is suited to the testator's particular situation.

Takeaway For Estate Litigators

Zealous advocacy demands examination of RESP issues in a multitude of contexts.

If you are representing the *sui juris* beneficiary of an RESP who finds themselves at odds with the RESP's subscriber (for example, if a child over the age of majority, and of sound mind, wishes to attend a post-secondary educational institution out of province, but their parent insists on their attending a local institution failing which they will prevent the child from accessing the funds in the RESP), you will want to consider whether you can prove that the elements of an express trust were present when the RESP was created, and then consider the use of the rule in *Saunders v. Vautier* to permit your client to terminate the trust and access the funds.

If you are representing a beneficiary or a bankrupt subscriber of an RESP and a creditor or the trustee in bankruptcy seeks to have the RESP counted amongst the assets of the bankrupt estate, you will want to consider whether the facts support an argument that *McConnell v. McConnell* should apply to have the RESP characterized as a trust so as to be excluded from the bankrupt's estate.

If you are representing an attorney or guardian for property for an incapable subscriber to an RESP, you will want to consider advising your client to seek the court's instructions as to whether RESP contributions

[55] See CRA Technical Interpretation No. 2005-0118891E5.

ought to be made on an ongoing basis, or whether the RESP ought to be collapsed in order to fund the incapable person's expenses where other estate assets are subject to specific bequests. If, on the other hand, you are representing the beneficiary of an RESP subscribed to by an incapable subscriber, your client may have grounds to seek continued contributions if the attorney or guardian for property is reluctant to make them following the subscriber's incapacity. The court will wish to examine whether it was the incapable person's intent, prior to their incapacity, that contributions continue, and whether, if contributions continue, there will be sufficient monies to provide for the support, education, and care of the incapable person and his/her dependants. Estate litigators should be aware of these potential friction points arising from RESPs in *SDA* litigation in order to most appropriately advise their clients.

If you are representing a beneficiary or estate trustee under a will, you will want to review the testamentary documents to ascertain whether the beneficiary or beneficiaries under an RESP subscribed to by the deceased have an enforceable interest to the funds in the RESP. Arguably, if the RESP falls into the residue of the estate due to an absence of a testamentary trust in the will, or if the will appoints a successor subscriber but the successor subscriber changes the beneficiary or collapses the RESP, there will arguably be no enforceable interest for the named beneficiary under the RESP. In these cases, you will want to consider whether there are facts present that support a *McConnell v. McConnell* argument that the RESP funds are already the subject matter of a trust and ought to pass to the beneficiary outside of the estate.

If you represent a Part V *SLRA* claimant, you should be aware that the RESP may form part of the residue of the estate, on one hand, or the section 72 assets, on the other hand (if it is considered a trust). The lawyer representing the beneficiary of the RESP will want to examine the wording of the testamentary document and make the argument that it is a separate trust outside of the testamentary document. This way, the RESP will not fall within the four corners of section 72 and should not be clawed back into the estate to fund the Part V support claim.

Given the paucity of *SDA* or estate litigation over RESPs, the writing of this paper has been an enjoyable exercise in addressing litigation issues. However, litigators would be wise to remember our duty to remind clients about proportionality. It is unwise to spend 25 cents to make a nickel. If the RESP is not worth a significant sum of money it may behoove the client to have that in mind before commencing litigation. If at the end of the day the client is financially worse off even if s/he wins, it will be a Pyrrhic victory.