

Q&A By John T. Syrtash, Associate, Garfin Zeidenberg LLP
Answers to pressing questions on Family Law.

Marriage breakup and RESPs

Question. I might be separating from my husband of 12 years. We have two children, ages 10 and 12. During the course of our marriage, I have been saving some money in an RESP for my children's post-secondary education. If we end up separating, how do I protect my children's education fund? I am ready to give up everything except my children's fund.

Answer. A Registered Education Savings Plan is a type of savings account that grows tax free until a child is ready for post-secondary education. RESPs are a good way to save for a number of reasons: the money grows tax free until the child needs it for tuition, residence and other educational expenses, and an RESP allows you to apply for the Canada Education Savings Grant on your child's behalf. Until recently you could contribute up to \$4,000 per year in an RESP, but the Harper government very recently removed the limit in the last budget. If only you have signing authority, then you'll have no worries.

The funds belong to the children. You are the "caretaker" of those funds, nothing more, nothing less. They are reserved for post-secondary purposes and can only be released to the educational financial institution for those purposes unless your child never goes to any post-secondary school. If that should happen, the contributor can, under certain circumstances, transfer the funds to their RRSP after 26 years or even withdraw the funds, minus the grants that had been received from the federal government. If your spouse has signing authority then the worst that can happen is that he releases the funds for some educational institution with which you do not agree or if your children never use the funds for postsecondary purposes, your spouse could theoretically transfer the funds into his RRSP or even withdraw the funds under certain severe restrictions and deductions.

The safest strategy is to ensure that you are the sole contributor to the RESP and that the financial institution clarifies that only you have the power to apply the funds to the educational institution concerned, and that if there will never be such an institution only you can apply to transfer the funds to your RRSP or withdraw the funds. Alternatively, many couples simply agree in their separation agreements to share responsibility for managing and applying RESP funds such that all decisions in respect of such savings could continue to be made. Why? Well, in many cases both parents contributed so the sharing of the RESP can continue.

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