YOUR DIVORCE AND THE RESP

What happens to your children's education savings?

During a separation or divorce, couples may fight over the house and kids, but for some families the RESP might be a considerable asset that can also cause a tug-of-war. Here's what you need to know about your child's education savings in the event of a break-up.

A separation or divorce can be an acrimonious time, rife with fights over the house, the money, and even the dishes. An RESP, or Registered Education Savings Plan, that families set up years ago for the children can become part of the battle — especially if it is considered one of the family's big assets.

If you have children, you may have opened an RESP to save for their education. It's an investment that allows contributors to save money for a child's (the beneficiary's) post-secondary education. Contributions to an RESP can be supplemented by grants and incentives from the federal and certain provincial governments. It can be a smart way to invest and grow money for the purposes of saving for education.

"RESPs can be a really good way to save for a child's education," says Zeljka Walker, an investment advisor with TD Wealth and a Certified Divorce Financial Analyst. "The money can grow on a tax-deferred basis and the federal government can add grants of up to $7,200 per beneficiary, depending on the amount of contributions."

If you were a couple when the RESP was established, you and your spouse or partner might be joint subscribers on the plan. That means that either of you can contribute to the RESP. Or, if you opened up the account yourself, it is possible that it might be a single subscriber account.

Who Does That Money Belong To?

"Despite the fact that the children are beneficiaries of the money contained within the RESP, the money is actually owned and controlled by the subscribers," explains Walker. "So, the subscribers can actually do what they want with the money."

That may not sit well with couples who are calling it quits. If the RESP has a single subscriber, that subscriber can call the shots and withdraw money if he or she wants. A subscriber doesn't need to wait for a child to enter a post-secondary institution to withdraw funds, but all or part of the grant money will have to be returned to the government. And as for withdrawal of the income earned in the plan, it will be subject to certain conditions and potential penalties. If the account has joint subscribers, both may need to approve any withdrawal from the account depending on the particular RESP provider's contract with the subscribers.

In Case of Divorce, How Will the RESP Be Divided?
The RESP can be dealt with in a few different ways in the event of a marital breakdown. Under the Income Tax Act, RESPs are not required to be divided between the parties.[1] So, a spouse and an ex can continue to be joint subscribers on an RESP for their children, and continue to contribute to it. But, you can't open a joint subscriber account once you are divorced.

The RESP can also be split equally between the two parties. "Money can be transferred from one RESP to another, if the beneficiaries

Domenic Tagliola, LLB and Tax and Estate Planner, TD Wealth, suggests that a well-drafted separation agreement should:

- Consider the type of RESP; individual plans, family plans, joint or single subscriber plans may need to be dealt with differently. Consult a professional.
- Include an obligation to continue to contribute to the RESP on whatever terms are agreed upon or if there is a court order to do so.
- Provide instructions on when the subscriber(s) can withdraw funds from the RESP.
- Protect the funds; prevent (or allow for) the transfer of funds into a new RESP, and not allow withdrawal of funds except for post-secondary education of the beneficiary.
- Provide instructions on who bears the tax liability/penalties, if any, on any RESPs to which they are joint or co-subscribers.
- Impose restrictions in the event of death as to who can be named in their respective wills as a successor subscriber.
- If preparing a separation agreement, consult legal and financial professionals, who understand tax and family laws.

remain the same," says Walker. "There would be no penalties for splitting the investment at the time of separation, and putting your half into your own RESP for the children."

Note that an RESP is an asset that is not protected from creditors. Therefore, if your ex files for bankruptcy at some point in the future, creditors may demand all or part of the value of the plan.

Contributing After the Divorce

If you've chosen to have a joint subscriber RESP, even though the two of you remain subscribers after the date of separation, any contributions made to the RESP would likely not be joint and would belong to the contributor, subject to any terms of your separation agreement. Walker says, "It is important to keep a record of the amount that was contributed to the RESP during the marriage and afterwards so that it is understood who the money belongs to."

If you have chosen to open a separate single subscriber RESP, understand that you will need to coordinate contributions with your ex. No beneficiary can receive more than the maximum of any applicable grant. Miscalculating contributions might mean an overpayment of the grant, which can lead to a monthly penalty on the over-contributed amount.

Family law in Ontario says that each parent, along with the student, may be responsible for bearing a reasonable share of post-secondary education costs.[2] The amount saved in an RESP during the marriage will often be used first for a child's education, before each parent would pony up a part of additional educational costs, typically proportionate to their incomes.

"Even though you might have an RESP," Walker says, "it might be wise to continue to save on your own so you can bear the brunt of any extra costs when the time comes."

If you would like to save up for your child's education, talk to your advisor. An RESP may not be the only investment you can use to save for post-secondary education. In fact, once grant money has been maximized, it may be appropriate to consider other tax-efficient investments.

— Denise O'Connell, MoneyTalk Life

[1]Canada Revenue Agency. Registered Education Savings Plans (RESPs): Frequently Asked Questions. cra-arc.gc.ca/tx/rgstrd/resp-reee/fq-eng.html. Accessed March 2, 2017

[2]Province of Ontario. O. Reg. 391/97: CHILD SUPPORT GUIDELINES. Family Law Act, R.S.O. 1990, c. F.3