

# Here's how executor could solve RESP puzzle



**James Daw**  
Money Talk

Elisabeth and her late husband, James, were generous and thoughtful. But, in uncharacteristic fashion, they left daughter Mary with a puzzle to solve.

They failed to update their wills, or take other steps to deal with a registered education savings plan they had set up long before their deaths.

Now, as executor, Mary must decide how to follow the will's instructions without defeating what her parents intended.

Elisabeth's simple will provided that the couple's money and property be divided equally among three children: Mary, her older brother and her younger sister.

While the will didn't mention the RESP, Mary knows her parents wanted to help her sister's four children with the cost of post-secondary education, after having given money earlier to other grandchildren.

Setting up an RESP with the securities arm of a bank had seemed like the best way to help the younger children.

Contributions of up to \$2,000 a year per child would qualify for a 20 per cent Canada education savings grant. Any interest on earnings would eventually be reported by the children for tax purposes.

The children who attended a qualifying post-secondary education or training program would get to use their grandparents' gift to cover various expenses.

Monthly account statements clearly state that it is the four grandchildren who are the intended beneficiaries. But Elisabeth was the sole subscriber, so the RESP was her property at the time of her death.

Mary recalls her mother saying she intended to make her younger daughter the subscriber, but she was too ill before her death to handle the paperwork.

Three different estate lawyers — Marni Whitaker of Lang Michener LLP, Corina Weigl of Fasken Martineau DuMoulin LLP and Anne Werker of Hull & Hull LLP — confirmed the RESP would thus become the property of the estate.

Unlike life insurance or a registered retirement savings plan, an RESP account does not pass outside the estate to the named beneficiary. It is, therefore, subject to estate settlement tax (formerly called probate tax) of up to 1.5 per cent in Ontario.

More importantly, the RESP contributions become an asset that Mary should consider when dividing the estate three ways, unless she comes to an agreement with her siblings to do otherwise.

"It's a question of what her ob-

ligations are to the other beneficiaries of the estate," Weigl said. "The net amount after tax should benefit all three (heirs) equally.

"(Only) if one of the children was actually going to university would there be an argument that a share should continue for the benefit of that grandchild."

When an RESP falls into an estate, the executor cannot change the names of the beneficiaries. But, without any instructions to the contrary, he or she could cancel the plan to recover the contributions.

The downside to that decision would be losing any investment gains and the federal government grants. The lawyers said it might be better for the beneficiaries to come to an agreement to preserve the plan.

That would involve either the executor contributing to the plan to acquire the full powers of a subscriber, or having a parent or parents of the children contribute to the RESP to become the new subscriber.

Mary would have to decide whether she wished to have responsibility for helping the beneficiaries get access to the money over the next several years, then claiming any unused money for the heirs.

If the three heirs could not agree to treat the RESP as separate from the rest of the estate, then the RESP contributions, grants and earnings could be treated as part of the mother's one-third interest in the estate.

Other executors who find themselves dealing with an RESP will have to confirm with the promoter of the plan what their options are regarding the recovery of money, and naming of other contributors. There is nothing in tax law that should prevent a transfer to another person who makes a contribution to the plan, said Weigl.

Spokespeople for both TD Canada Trust and USC Education Savings Plans Inc. said an executor may assign one of their RESPs to a different qualified subscriber, who would then become the beneficial owner.

As the beneficial owner, the new subscriber would be entitled to direct the use of the funds, cancel the plan or receive any portion of the plan the beneficiaries do not qualify to claim.

Werker said some grandparents who establish RESPs may wish to appoint a parent of the beneficiary as the succeeding subscriber in his or her will.

Whitaker said some may simply say in their wills how funds in RESPs should be handled. Others may offer a gift of money so the parent can set up a plan. But Werker cautions against using money held in trust for a child to buy an RESP, because that would be a breach of the trust.

**James Daw**, CFP, appears Tuesday, Thursday and Saturday. He can be reached at Business, 1 Yonge St., Toronto M5E 1E6; at 416-945-8633; 416-865-3630 by fax; or at [jdaw@thestar.ca](mailto:jdaw@thestar.ca) by email.