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— Franks & Zalev - This Week in Family Law

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Section 9(1)(d) of the *Family Law Act*: It's Not Just for Reading Anymore

Van Delst v. Hronowsky (2022), 74 R.F.L. (8th) 7 (Ont. C.A.) — Gillese, Harvison Young, and Coroza JJ.A.

Regular readers might recognize this case of "how do I value a non-Ontario-pension" fame (see "Pensions! How to Deal with Federal Pensions (in Ontario)!! Hooray!!!" in the 2020-25 (June 29, 2020) edition of *TWFL*).

But some cases have more than one lesson to offer, and such is the case with *Van Delst*, which recently made its second trip to the Ontario Court of Appeal.

In 2017, the respondent wife brought an application against the appellant husband for, among other things, equalization of net family property. The most controversial issue at trial was the valuation of the parties' pensions for equalization purposes.

Ultimately, the trial judge determined that the husband's pension should be valued based on a "normal" age of retirement of 60, while the wife's pension should be valued based on a "reasonable" age of retirement of 65. As a result, it was determined that the wife was entitled to an equalization payment of $563,560.23 (plus pre-judgment interest).

The husband appealed and was partially successful. The Court of Appeal concluded that the value of *both* parties' pensions should have been based on a "normal" age of retirement of 60, and the matter of calculation was remitted back to the Superior Court: *Van Delst v. Hronowsky* (2020), 42 R.F.L. (8th) 300 (Ont. C.A.) and *Van Delst v. Hronowsky*, 2020 CarswellOnt 8484 (C.A.).

As a result of the recalculation, the husband was ordered to pay the wife $348,538.69 in equalization, $13,063.04 in post-judgment interest, $32,732.32 in costs, and some other small amounts that brought the total owing up to $395,392.26.

It was also ordered that if the husband did not pay by a certain date, the amount he owed was to be transferred to the wife from either the husband's non-registered investment account, or from his pension (into a LIRA in the wife's name), pursuant to s. 9(1)(d) of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3. And, finally, the Court ordered the husband to pay the wife her full recovery costs.

The husband appealed again. The primary ground of appeal was that the court below was wrong to make an order under s. 9(1)(d) for satisfaction of the amounts owing from his investment accounts if the amounts were not paid.

Subsection 9(1)(d) of the *Family Law Act* states:

Powers of court

9 (1) In an application under section 7 [for equalization], the court may order,

(a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;

(b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;

(c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and

(d) **that, if appropriate to satisfy an obligation imposed by the order,**

(i) **property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or**

(ii) **any property be partitioned or sold.**

[emphasis added]

The Court of Appeal saw no error. The wife had brought a motion for security or enforcement, and the trial judge properly exercised discretion under s. 9(1)(d) to both secure and enforce payment within 15 days. This was reasonable given the husband's past behaviour, including non-compliance with previous orders; failing to provide proof of his annual income; non-payment of costs orders; and delaying the resolution of the matter by disputing garnishment proceedings.

Section 9(1)(d) is, in our opinion, an underused provision, and it was used entirely appropriately in this case to ensure the husband paid what he owed. If a party's prior conduct gives rise to the reasoned belief that amounts owing are not going to be paid, then resort to s. 9(1)(d) is entirely appropriate.

The husband also sought leave to appeal the costs awarded against him. He was not successful here either, mainly because the wife had beat her own Offers to Settle thus invoking the cost consequences of Rule 24(14) of the *Family Law Rules*, O. Reg. 114/99, and because the husband insisted on the first trial when the pension valuations were within $1,000 of each other.

Everything You Ever Wanted to Know About RESPs . . . And Then Some

L. v. L., 2022 CarswellOnt 11880 (S.C.J.) — Faieta J.

So what exactly is an RESP? Is it a trust relationship? Are children the beneficiaries of an RESP? Do the contributors own it? All excellent questions considered — and answered — by Justice Faieta in *L. v. L.*.

The parties were married in 2003 and had two children together. They separated in 2010. They signed a Separation Agreement in 2011 that provided, among other things, that they would both make annual contributions to a registered education savings plan ("RESP") for the children, and that they would use the RESP to pay for the children's post-secondary educations.

Over the next decade, the parties contributed approximately equal amounts to the children's RESP (the mother contributed about 57% and the father contributed about 43%), and by 2022, the RESP had a total value of approximately $206,000.

The parties' eldest child, DL, was accepted to McGill for September 2022, and told the father that she would need funds from the RESP. The father, who was estranged from DL at that point, refused to release funds from the RESP. Instead, he took the position that:

• The RESP should be divided between the parents in proportion to their respective contributions, and that they would then use their respective shares to cover their proportionate shares of DL's post-secondary expenses; and

• The mother should be paying for the vast majority of DL's post-secondary expenses, as she was earning more than $1,000,000 a year, while he was earning less than $100,000.

Not surprisingly, the mother disagreed. She had already advised the father that she was prepared to pay for all of the children's s. 7 expenses without contribution from him, and wanted to be able to use the RESP to pay for the children's post-secondary school expenses.

Both parties brought motions to ask the Court to decide what should happen.

Historically, the law regarding RESPs has not been entirely clear. Some cases have suggested that, no matter who contributes, an RESP is used to reduce the cost of post-secondary education: *H. (M.J.) v. N. (B.E.)*, 2007 CarswellNS 694 (S.C.); *Crisp v. Crisp*, 2012 CarswellOnt 9038 (S.C.J.); *Hesketh v. Wright*, 2007 CarswellOnt 855 (C.J.).

Other cases have suggested that where only one parent contributes after separation, only that parent gets the benefit of the RESPs saved: *L.A.U. v. L.L.L*, 2016 CarswellPEI 6 (S.C.); *E.B.H. v. E.H.*, 2017 CarswellOnt 14004 (S.C.J.); *T.M.R. v. S.M.S.* (2019), 24 R.F.L. (8th) 235 (N.B. Q.B.). That is, the non-contributing parent cannot reap the benefits of the other's RESP contributions post-separation.

Where both parents contribute, post-separation RESP contributions are to be credited to the parent that contributed: *Rumpel v. Wills*, 2010 CarswellSask 679 (Q.B.); *C.S. v. D.A.S.*, 2020 CarswellOnt 292 (C.J.).

Other cases have gone further to suggest that, where one parent alone contributes to RESPs post-separation, the RESP will not be included in the child support calculation — rather, it is to be considered a prepayment of future obligations by the parent establishing the plan: *Foster v. Amos*, 2010 CarswellSask 742 (Q.B.); *Urquhart v. Loane* (2016), 82 R.F.L. (7th) 290 (P.E.I. C.A.). In fact, in *Urquhart*, the Court agreed that it did matter whether the funds were contributed pre-marriage or post-separation.

To us, it seems logical that RESPs owned on the date of separation should be used to reduce the overall cost of education, and that RESPs saved after separation should be to the credit of the party making the contributions. However, this analysis skips a step. The first question is: are the RESPs owned by either or both parties — and if so, what is the nature of that ownership? *L. v. L.* considers the nature of RESPs and whether they are actually owned by the annuitant.

Here, the mother asked for an Order transferring the RESP into her sole name, and allowing her to use the funds solely for the purpose of funding the children's post-secondary school expenses (in the alternative, the mother asked for an Order giving her sole carriage of the RESP, and sole authority to disburse the funds to the children).

The father asked for an Order dividing the RESP into two separate accounts for each party in proportion to their respective contributions, and requiring the mother to sign any necessary documents to complete the division. Justice Faieta dismissed the father's motion because he was not satisfied that he had jurisdiction to divide an RESP. (Although the father attempted to rely on *Christakos v. De Caires*, 2016 CarswellOnt 1433 (S.C.J.), the Order dividing an RESP in that case was made on consent, and the decision did not actually consider or discuss whether the Court actually had jurisdiction to make such an Order.)

The mother argued that the parties were holding the RESP in trust for the children. The father disagreed, and argued that the RESP belonged to the parties in proportion to their respective contributions. To decide who was right, Justice Faieta started by thoroughly reviewing what RESPs are, and how they work:

[45] . . .

• The basic framework for an RESP is established under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) ("*ITA*").

• **An RESP is a contract between an individual ("the subscriber") and an organization ("the promoter") designed to help parents, family, and friends to save towards a beneficiary's post-secondary education**: Canada

Revenue Agency, Information Circular No. IC93-3R2, *Registered Education Savings Plans*, May 4, 2016 ("CRA Circular"), page 2; *ITA*, s. 146.1 (1).

• Under the contract, **the subscriber names one or more beneficiaries and agrees to make contributions for them, and the promoter agrees to pay educational assistance payments to the beneficiaries**. The subscriber's contributions are not deductible from their income tax.

• Aside from helping a child finance their cost of post-secondary education, the benefits of an RESP are that: (1) **taxes on income earned on contributions are deferred until the income is withdrawn**, and (2) **federal government grants are paid on contributions made to an RESP**.

• Various government grants and incentives are available. A basic Canada Education Savings Grant ("CESG") of 20% on the first $2,500 of annual RESP contributions is paid into the RESP under the *Canada Education Savings Act*, S.C. 2004, c. 26 ("*CESA*").

• An RESP is a vehicle designed for individuals to accumulate income for post-secondary education.

• **The only permissible payments out of an RESP are**:

o Subject to the terms and conditions of the RESP, **the promoter can return contributions to the subscriber or to the beneficiary at any time.**

o **Educational Assistance Payments** (which does [not] include a refund of contributions but does include the RESP's accumulated investment earnings (earnings on the money saved in the RESP) and CESGs) can be paid to or for the beneficiary student to help finance the cost of post-secondary education if the student is enrolled in a post-secondary educational institution or other qualifying educational program or if the beneficiary student is at least 16 years old and is enrolled in a specified educational program.

o **Accumulated income payments** ("AIPs"), which are investment earnings that accumulate on contributions made to a RESP and on amounts paid under the *CESA*, can be paid to a subscriber if the beneficiary is 21 years old and is not pursuing post-secondary education and the plan has been in existence for at least ten years. AIPs must be included in the subscriber's income for the year the payments are received. The payments are subject to a 20% additional tax on top of the regular tax rate payable on the subscriber's income. The subscriber can reduce or eliminate this additional tax by contributing the AIPs to his or her RRSP or to a spousal RRSP up to a maximum of $50,000.00.

o **Repayment of amounts under the *CESA***: See section 11 of the *Canada Education Savings Regulation*, S.O.R./2005-151.

o **Payments to a designated educational institution** and payments to a trust to accommodate transfer of property between RESPs.

• **Any amount received by a taxpayer in satisfaction of a subscriber's interest under an RESP must be included in computing the taxpayer's income** except:

o Any amount received in satisfaction of a right to a refund of payments under the plan: *ITA*, ss. 146.1 (7.1)(b), 146.1 (7.2)(b)(ii).

o Any amount received by a taxpayer under a court order or agreement relating to a division of property between the taxpayer and the taxpayer's spouse or common-law partner in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership: *ITA*, ss. 146.1 (7.11)(b), 146.1 (7.2)(b)(iii).

> • **The subscriber of a plan can change the named beneficiary under an RESP if the terms of the plan allow**: CRA Circular, paras. 74-75.
>
> • If a subscriber dies, their estate may continue the RESP or name another individual as an alternate subscriber. The terms of the RESP and provincial law will dictate what happens to the RESP: CRA Circular, para. 8. [emphasis added]

After explaining what RESPs are and how they work, Justice Faieta considered whether the RESPs generally belong to the subscriber (as argued by the father), or whether the subscriber is holding the RESP in trust for the beneficiary (the children) (as argued by the mother).

The cases that have considered this issue are not consistent. On the one hand, in *McConnell v. McConnell*, 2015 CarswellOnt 4939 (S.C.J.), Justice Price held that "[a]n R.E.S.P. is not property belonging to or in the possession of either spouse." Rather, it is "a trust fund held by the trustee, who is the administrator of the R.E.S.P., on behalf of the children, who are its beneficiaries."

On the other hand, there are a number of cases where courts have held that RESPs are property that belong to the subscriber, including *Payne, Re*, 2001 CarswellAlta 1379 (Q.B.), *Vetrici v. Vetrici* (2015), 57 R.F.L. (7th) 18 (B.C. C.A.); *Zwack v. Butler* (2015), 67 R.F.L. (7th) 356 (B.C. S.C.); *Barnes v. Bates*, 2014 CarswellBC 1410 (S.C.); *C.S. v. D.A.S.*, 2020 CarswellOnt 292 (C.J.); *M. (C.S.) v. L. (W.S.)* (2015), 68 R.F.L. (7th) 229 (B.C. Prov. Ct.) at paras. 26-28; and *Chong v. Donnelly*, 2021 CarswellOnt 10986 (S.C.J.).

After considering the authorities, Justice Faieta ultimately disagreed with *McConnell*, and concluded that, as a general rule, an RESP belongs to the *subscriber*, and not the beneficiary:

> [50] Having regard to solely the statutory framework for an RESP, it is my view that the establishment of an RESP does not establish a trust for a beneficiary given that the *ITA* permits a subscriber to, at any time, obtain a refund of their contributions from the promoter. A subscriber also has the right to change beneficiaries: See Canada Revenue Agency, *Registered Education Savings Plans (RESP)*, RC 4092(E) Rev. 21 (17 November 2021), at p. 12.
>
> [51] Accordingly, unless the circumstances dictate otherwise, an RESP is the property of the subscriber. This conclusion also appears to be supported by s. 146.1(1) of the *ITA* which in its definition of "subscriber" appears to contemplate that an RESP may be considered to be the property of a subscriber. The definition states:
>
> > . . . an individual who has before that time acquired a subscriber's rights under the plan pursuant to a decree, order or judgment of a competent tribunal, or under a written agreement, relating to a **division of property** between the individual and a subscriber under the plan in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership. [emphasis in original]

We agree with Justice Faieta on this point. As Philip Epstein explained in his discussion of *Elias v. Elias* (2018), 11 R.F.L. (8th) 213 (Ont. S.C.J.), in the 2018-39 (October 1, 2018) edition of *TWFL*, which was another decision about RESPs that considered *McConnell*:

> Justice Maddalena of the Ontario Superior Court of Justice says, "it is clear and courts have held in the past that RESPs do not form part of net family property". *McConnell v. McConnell*, 2015 CarswellOnt 4939 (Ont. S.C.J.), is cited for that proposition. Respectfully, I do not think that is the case. **An RESP belongs to the person in whose name it is registered unless the other parent has an argument about resulting or constructive trust in relation to the RESP. It is not a trust fund for the children. RESP funds are not impressed with a trust on behalf of children**. This issue is discussed in *M. (C.S.) v. L. (W.S.)*, 68 R.F.L. (7th) 229 (B.C. Prov. Ct.) by Judge Saunders. [emphasis added]

That being said, Justice Faieta also determined that an RESP can be held in trust for the beneficiaries if all three of the elements for the creation of a valid trust (i.e. the "three certainties") have been established, namely, "certainty of intention to create a trust; certainty of subject matter; and certainty of objects: *Corvello v. Colucci*, 2022 CarswellOnt 1931 (C.A.), para. 7."

In this case, Justice Faieta was satisfied that all the three certainties had been established because, as previously noted, the Separation Agreement required the parties to use the RESPs for the children's post-secondary educations:

> [54] To ascertain certainty of intention in the absence of a written trust agreement, "the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed, and as to how the parties conducted themselves" must be considered: *Corvello*, para. 10.
>
> [55] In this case, there is no evidence of a written trust agreement nor the RESP contract between the subscribers and the CIBC. However, the parties signed a [Separation Agreement] which states:
>
> > *The RESPs* maintained by the parties *shall* be used for *the children's* postsecondary education. [Emphasis added]
>
> [56] I find that the RESP is held in trust for the children's post-secondary education given that the three certainties have been established by the language of the [Separation Agreement] as follows: (1) the use of the word "shall" establishes a legal, rather than a moral, obligation that the RESP be used for the beneficiaries; (2) the subject-matter or property of the trust is certain given the reference to "the RESPs maintained by the parties" and thus includes the CIBC RESP; and (3) the objects of the trust are certain in that the "children" are identified as the beneficiaries. [emphasis in original]

After finding that the RESP was being held in trust for the children, Justice Faieta relied on the court's inherent jurisdiction to give the mother sole authority to disburse the funds in the RESP, and ordered her to account to the father for any withdrawals within 14 days. However, he also confirmed that this arrangement was without prejudice to any further motion that might be brought to determine whether all of DL's expenses should be paid out of the RESP (i.e. the mother's ultimate position), or whether these expenses should be shared pursuant to s. 7 of the *Guidelines* (i.e. the father's position).

To avoid this type of dispute in the future, it is important to include clear wording in the parties' settlement instrument about how RESPs are to be used, and whether:

- The RESP will be divided (whether notionally or actually) between the parties so that they can each use the funds how they see fit (including but not limited to covering their respective shares of any post-secondary expenses pursuant to s. 7 of the *Guidelines*); or
- The RESP will be used to pay for the child's post-secondary expenses, and the parents will only share any post-secondary expenses that are not covered by the RESP pursuant to s. 7.

The settlement instrument should also address how any disputes are to be resolved.

If only one party is named as the sole subscriber of an RESP that was established during the marriage, it is important to take steps to ensure that the subscriber will actually be obliged to use the RESP to cover a child's post-secondary expenses (e.g. by having the other party's name added to the account or splitting the account into two). Otherwise, there will be nothing to prevent the sole subscriber from withdrawing the funds from the RESP at any time and using them however s/he sees fit — even though the RESP was not included in the property division.

Uh . . . We Seem to Be in the Wrong Line of Work

Kemeny v. Callidus Capital Corporation, 2021 CarswellOnt 19279 (S.C.J.) — Stewart J.

This is not a family law decision — but it will help family lawyers get paid, and we're certainly in favour of that. (It will also help family lawyers not get sued, and we're in favour of that, too.)

It is quite common that when transferring a file, former counsel will get a signed Irrevocable Direction to have their fees paid from the sale of a home, other assets, or settlement proceeds. That is what happened here, albeit not in the family law context.

The plaintiff, Kemeny, was an independent financial consultant who was retained by his former employer (the "borrower") to help secure financing that could not be obtained from conventional lenders. The defendant/lender, Callidus, was in the business of providing precisely such funding.

Negotiations resulted in an Irrevocable Direction to govern payment of Kemeny's compensation for his efforts in brokering the transaction. The Irrevocable Direction was signed by a representative of the borrower and the defendant/lender, and it provided for the defendant/lender to pay Kemeny a specified fee directly from the proceeds of the borrower's first draw on the credit facility.

A request from Kemeny for payment resulted in a letter from the defendant/lender saying that there was insufficient "availability" to pay the fee pursuant to the Irrevocable Direction. The defendant/lender advanced funds to the borrower, but did not pay Kemeny his fee. As a result, Kemeny found himself in the same situation as a lawyer who was supposed to benefit from an Irrevocable Direction, but who was not being paid.

Justice Stewart made quick work of the matter. The defendant/lender breached its payment obligations under the Irrevocable Direction and was liable to Kemeny for damages. While the Irrevocable Direction was an agreement between the defendant/lender and the borrower, it was also an agreement obliging the defendant/lender to ensure payment of those fees directly to Kemeny.

While the borrower was ultimately liable for Kemeny's fees, it was "commercially reasonable" for Kemeny to have received the contractual assurance from the defendant/lender that he would be paid promptly out of the first draw. And there were not limits on that obligation on the face of the Irrevocable Direction.

To Justice Stewart, it did not matter whether the obligations on the defendant/lender were as a trustee [see *Milne Estate (Re)*, 2019 CarswellOnt 843 (Div. Ct.)] or as a fiduciary. The fact of the matter was that the defendant/borrower had undertaken to protect Kemeny's fees.

Kemeny was entitled to judgment for the full amount of his fee which, by the way was 2% of the credit facility, which amounted to $680,000 USD. We're in the wrong line of work.

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