SUPREME COURT OF YUKON

Citation: *Sutherland v. Collett (Estate)*, 2017 YKSC 36

Date: 20170619
S.C. No. 10-B0044
Registry: Whitehorse

BETWEEN:

NINA MAE SUTHERLAND

PLAINTIFF

AND

THE ESTATE OF RICHARD GEORGE COLLETT

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:
Tyson McNeil-Hay — Counsel for the Plaintiff
Daniel H. Coles — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application to determine whether certain RRSPs, for which the deceased, Richard Collett, was the subscriber, belong to his estate or to his former common-law spouse, Nina Sutherland. Mr. Collett's estate is the applicant and Ms. Sutherland is the respondent. Mr. Collett and Ms. Sutherland cohabitated for approximately 6½ years from October 2003 until February 2010. Following the separation, Ms. Sutherland commenced this action, principally to deal with the division of communal assets. That aspect was resolved by way of a Settlement Conference Order, emanating from a judicial settlement conference held December 9, 2010 (the

"SCO"). At that time, both parties were represented by legal counsel. The SCO dealt with various aspects of the parties' communal property and the penultimate paragraph states: "There shall be no further claims by either party arising from this relationship" (the "release clause").

[2] During the relationship, Mr. Collett designated Ms. Sutherland as the beneficiary of certain RRSPs he subscribed to at Scotiabank (the "RRSPs"). Following Mr. Collett's death on October 13, 2015, the estate sought to have Ms. Sutherland renounce any claim to the RRSPs, on the basis that she had given up all rights to same through the SCO. Ms. Sutherland has refused to do so and opposes the present application, on the basis that she is still the validly designated beneficiary of the RRSPs.

FACTS

[3] I did not understand from counsel at the hearing that there are any significant disputes in the facts. I have reviewed and relied upon the following affidavits:

a) Kari-Anne Stubbs, a friend of Mr. Collett's for approximately 24 years;
b) Diana Rothgeb, Mr. Collett's common-law partner at the time of his death;
c) Valerie Miller, Ms. Rothgeb's mother and an acquaintance of Mr. Collett for approximately five years;
d) Robbie King, a friend of Mr. Collett's for approximately 20 years; and
e) Nina Sutherland.

[4] Counsel for the estate and counsel for Ms. Sutherland also filed a joint book of documents.

[5] On the basis of the affidavits, the joint documents, the pleadings and submissions, I make the following findings of fact.

[6] Mr. Collett was the owner and operator of a contracting company.

[7] Prior to his relationship with Ms. Sutherland, Mr. Collett was in a relationship with Francine Girouard, who was at that time the designated beneficiary of the RRSPs. Mr. Collett and Ms. Sutherland commenced their romantic relationship in October 2003. They were never married and were not the parents of any children.

[8] During the course of the relationship:

a) Ms. Sutherland was employed with the Government of Yukon;

b) Mr. Collett resided from time to time with Ms. Sutherland at her home on Lot 22, Pilot Mountain, Whitehorse ("Pilot Mountain"). However, Mr. Collett also maintained a separate residence at 14 Chadburn Crescent, Whitehorse ("Chadburn Crescent"); and

c) Mr. Collett and Ms. Sutherland maintained separate bank accounts and finances and at no time had any joint accounts, credit cards or loans and debts.

[9] On December 5, 2007, Mr. Collett changed the beneficiary of the RRSPs from Ms. Girouard to Ms. Sutherland. In that portion of the Scotiabank document signed by Mr. Collett for that purpose, in the box entitled "Information about the Beneficiary", Mr. Collett indicated under the heading "Relation to account owner" that she was his "Spouse" and was to receive 100% of the proceeds.

[10] Mr. Collett struggled with an alcohol problem for most of his life, but during his relationship with Ms. Sutherland, he was generally able to control his drinking.

[11] In August 2009 and again in February 2010, Mr. Collett confessed to Ms. Sutherland that he was having an affair with Diana Rothgeb.

[12] The couple separated on February 9, 2010.

[13] Diana Rothgeb moved into Mr. Collett's home in mid-February 2010, and continues to reside there. She describes the break up with Ms. Sutherland as "a bitter and dragged-out affair" and that Mr. Collett "spoke very critically" of Ms. Sutherland to Ms. Rothgeb and their circle of friends. Ms. Rothgeb also described Mr. Collett as being "disorganized and cluttered when it comes to paperwork". She deposed that he "rarely opened mail related to his finances until it was time to file his taxes" and in her experience, Mr. Collett "paid little attention to communication from his bank or other financial institutions".

[14] Valerie Miller also described Mr. Collett as "not well organized, particularly when it came to paperwork or bookkeeping" and that generally. Mr. Collett "did not have a great attention to detail".

[15] Kari-Anne Stubbs described the breakdown of the relationship as "acrimonious" and stated that Mr. Collett "felt bitter" towards Ms. Sutherland.

[16] Robbie King deposed that he knew "Mr. Collett did not want Ms. Sutherland to have any of his RRSPs, or for that matter, any claim to any aspect of his Estate."

[17] Ms. Sutherland instructed her lawyer, Kathleen Kinchen to commence this action on August 24, 2010.

[18] October 29, 2010, Mr. Collett instructed his lawyer, Shayne Fairman, to file a statement of defence, counterclaim and sworn financial statement. In the financial statement, Mr. Collett disclosed, among his various assets, that he had an RRSP with the Bank of Nova Scotia which he had acquired prior to 2003 and that its value was $85,000.

[19] On December 9, 2010, the parties attended a judicial settlement conference with their respective lawyers. I was the presiding judge at that settlement conference.

[20] Mr. Collett's counsel filed a Settlement Conference Brief on December 8, 2010, which included a section entitled "Superannuation Pension Plan/RRSP", under which with the following paragraphs:

> 57. During the course of the relationship, Nina contributed to Superannuation Pension benefits through her employment with the Government of Yukon.
>
> 58. Similarly, during the course of the relationship, Richard made modest contributions to a Registered Retirement Savings Plan in his name.
>
> 59. Richard proposes that, in the interest of settlement, that any claims he has to pension plan benefits accumulated by Nina during the relationship would be waived and similarly, any claims Nina would make to RRSP contributions made by Richard during the relationship would be waived.

[21] The superannuation pension and RRSPs were discussed briefly during the judicial settlement conference. When Mr. Collett was asked by his counsel whether he contributed to his RRSPs during the relationship, Mr. Collett made reference to having some RRSPs in 2005. When asked about the period from 2003 to 2010, Mr. Collett made reference to a purchase of about $15,000 of RRSPs, which he said was a "one-time" purchase.

[22] Ms. Sutherland deposed in her affidavit:

> At the time of the settlement conference and the agreement resulting from it, I was aware that I was giving up any rights I might have arising from family law rules and obligations, including the right to claim some portion of what Richard had accumulated in the RRSP during our relationship. (my emphasis)

[23] The communal property at issue during the judicial settlement conference included:

- real property in Whitehorse, the Pilot Mountain subdivision, Haines Junction and Costa Rica;
- the value of improvements done to the various real properties;
- tools;
- a $20,000 loan from Mr. Collett to Ms. Sutherland;
- pets;
- vehicles;
- Air North shares;
- Mr. Collett's contracting business;
- the superannuation pension plan and the RRSPs; and
- costs.

[24] The judicial settlement conference ended with an offer from Ms. Sutherland's counsel that was accepted by Mr. Collett and was later confirmed by the SCO, which was dated December 9, 2010 and filed January 4, 2011. The SCO was signed by each of Ms. Kinchen and Mr. Fairman. For the sake of completeness, and to put the release clause into context, I will set out all 10 paragraphs of the SCO:

> THIS COURT ORDERS THAT:
>
> 1. The plaintiff shall retain her home at Lot 22 Pilot Mountain Subdivision for her own use absolutely and the defendant shall have no claim against the plaintiff's home.
>
> 2. The plaintiff shall retain her Government of Yukon Superannuation Pension benefits for her own use

absolutely and the defendant shall have no claim against the plaintiff's pension benefits.

3. The defendant shall retain his business known as 38263 Yukon Inc. doing business as Collett Contracting, for his own use absolutely and the plaintiff shall have no claim against the defendant's business or its assets.

4. The defendant shall retain the Costa Rica properties which are owned by a Costa Rican corporation named Yukon Properties S.A. of which the defendant is the sole share holder [as written] and the 1994 Toyota pick up which is owned by a company known as Bolo S.A. of which the defendant is the sole shareholder, for his own use absolutely and the plaintiff shall have no claim against the properties or the 1994 Toyota pickup.

5. The plaintiff and defendant shall each retain one of the two Air North shares that are jointly owned. The parties will sign the necessary documents and pay the necessary fees to effect this change.

6. The defendant shall forgive the $20,000.00 loan made to the plaintiff.

7. The plaintiff shall transfer to the defendant her interest in the Agreement for Sale of Lot 9, in the Bear Berry Meadow Subdivision in the Town of Haines Junction in the Yukon Territory under plan #2005-0038 which the parties hold as joint tenants for the sum of $10,000.00 payable by the defendant at the time of transfer.

8. The defendant shall transfer ownership of the 1998 Pathfinder to the plaintiff for her own use absolutely, upon receipt of the vehicle registration from the plaintiff.

9. There shall be no further claims by either party arising from this relationship.

10. Each party shall be responsible for their own costs of this proceeding.

[25] On January 6, 2011, two days after the SCO was filed, Mr. Collett executed his Last Will and Testament at his lawyer's office. In Mr. Collett's former Will, he had named Ms. Sutherland as his spouse. However, the Will he executed on January 6, 2011 named Diana Rothgeb as his executor and trustee, and also as the beneficiary of the entirety of his estate.

[26] Mr. Collett died on October 13, 2015, at the age of 64.

[27] Ms. Sutherland is presently 65 years of age. She retired in March 2012 and currently resides in Kamloops, British Columbia.

[28] At the date of his death, Mr. Collett's RRSPs had a market value of approximately $170,000.

[29] On November 6, 2015, Ms. Rothgeb obtained a Grant of Probate for Mr. Collett's estate, confirming her status as executor.

[30] On August 24, 2016, then counsel for the estate contacted Ms. Sutherland to seek her cooperation in changing the beneficiary of the RRSPs to the estate.

[31] To date, Ms. Sutherland has refused to cooperate with the estate and has advanced a claim for the RRSPs.

ANALYSIS

Issue #1: Does Ms. Sutherland's claim to the RRSPs breach the terms of the SCO?

[32] In my view, the answer to this question is a resounding "yes". As the judge who presided over the judicial settlement conference, it is plain to me that the parties intended to make a full and final settlement of their communal property dispute at that time. Further, the proposal by Mr. Collett's lawyer in the settlement conference brief as to how the parties should resolve their respective claims against the other's

pension/RRSP was implicitly accepted by both and was expressly resolved by the release clause. Further, the surrounding factual matrix makes it clear that Mr. Collett did not want Ms. Sutherland to benefit from the RRSPs. On the contrary, the separation was acrimonious and Mr. Collett felt bitter towards Ms. Sutherland. Rather, it was Mr. Collett's intention, as demonstrated by making a new will two days after the SCO was filed, that he intended his new common-law spouse, Diana Rothgeb, to receive his entire estate, which as a result of the release clause, would include the RRSPs.

[33] The SCO reflects a bargain reached by the parties at the judicial settlement conference. That bargain was reduced to writing, signed by counsel for the parties as their respective agents, and entered as an order of the court. The terms of the SCO confirm that neither Mr. Collett nor Ms. Sutherland obtained all the relief they were seeking in their respective pleadings or settlement conference briefs, because concessions were made by each party. Because the SCO did not deal with all of the issues raised by the parties, it is my view that the release clause was intended as a "catchall provision" at the end of the order in order to prohibit any further claims by either party. In my view the intention of the release clause was to make the SCO a final order, bringing the litigation and all claims arising from the relationship to an end.

[34] In *McKenzie v. McKenzie* (1975), 55 D.L.R. (3d) 373 (B.C.S.C.), ("*McKenzie*") Macfarlane J. concluded, at paras. 24 and 27, that there was a well-established practice in our courts "to enforce settlement agreements in the suit compromised", primarily to avoid a multiplicity of proceedings. *McKenzie* was affirmed on this point by the British Columbia Court of Appeal, (1976), 69 D.L.R. (3d) 765.

[35] *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 65, is an analogous case from the Ontario Court of Appeal dealing with leave to appeal consent orders. Epstein J.A., speaking for the majority, said this, at para. 59:

> 59 A review of the limited jurisprudence respecting leave to appeal consent orders, in Ontario and elsewhere in Canada, reveals that no clear test has emerged for granting leave in consent matters. However, what is clear is the resistance to allowing a review of issues that the parties have represented to the court as having been resolved. The expression of this resistance dates back to 1876, in the English case of *Holt v. Jesse*, 3 Ch.D. 177, at p. 184:
>
> > That is tantamount to giving a 'general license to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the court, because on a future day they find they do not like it.' (my emphasis)

[36] I find further support for my conclusion in this regard in the case of *Hemmerling v. Hemmerling*, 2000 ABQB 808. Although that case referred to "minutes of settlement" as the instrument to resolve the matrimonial dispute, minutes of settlement are obviously analogous to a consent order arising from a judicial settlement conference. There, Nash J. emphasized the importance of respecting the finality of minutes of settlement, as follows:

> 16 Minutes of Settlement are normally intended to resolve all outstanding matrimonial property issues between divorcing spouses. The Minutes of Settlement entered into by the parties, with the advice of lawyers during the negotiations and at the time of the execution, are recognized as a full and final settlement of all property issues. The Supreme Court of Canada in ***Pelech v. Pelech***, [[1987] 1 S.C.R. 801], stated at p. 676:
>
> > . . . where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should

> be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected.

[37] The approach I take to interpreting the SCO is the same as I would take towards the interpretation of a contract. First, I must read the SCO as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances, i.e. the contextual factors or what has been referred to as the factual matrix: *Sattva Capital v. Creston Moly*, 2014 SCC 53, at paras. 47, 48 and 50.

[38] Ms. Sutherland's counsel argued that the SCO does not preclude his client from making a claim against the RRSPs because her claim is not one "arising from [the] relationship", as the release clause is worded. Rather, he submits that Ms. Sutherland's claim arises from statute, in particular, s. 11 of the *Retirement Plan Beneficiaries Act,* R.S.Y. 2002, c. 197, as amended, ("*RPBA*") which generally provides that a person designated as a beneficiary may enforce payment of the benefit payable to them as against the administrator of the plan, in this case Scotiabank.

[39] The estate's counsel counters this argument by submitting that the claim to the RRSPs plainly arises from the relationship because the RRSP form completed by Mr. Collett designating Ms. Sutherland as the beneficiary describes her "relation" to him as "spouse". Further, the language used by the parties in the release clause "arising from this relationship" was broad and purposive and describes the factual matrix wherefrom no further claims can be pursued. Accordingly, any claim Ms. Sutherland had to the RRSPs was inextricably linked to her relationship with Mr. Collett, and the SCO now prevents her from pursuing any claims that arise from that relationship.

[40] I agree with the submissions of the estate's counsel here. I further conclude that 'but for' the relationship, Mr. Collett would have had no reason to designate Ms. Sutherland as the beneficiary of the RRSPs. On the other hand, I conclude that the interpretation advanced by Ms. Sutherland's counsel is overly technical and narrow and I reject it.

[41] Accordingly, I declare that the SCO prohibits Ms. Sutherland from maintaining or advancing any claims, rights or interests with respect to the RRSPs which Mr. Collett held at the Whitehorse, Yukon branch of Scotiabank.

Issue #2: Further, or in the alternative, did the SCO revoke Ms. Sutherland status as a beneficiary pursuant to s. 2 of the RPBA?

[42] Section 2 of the *RPBA* provides:

> 2 A participant may designate a person to receive a benefit payable under a plan on the participant's death
>
> (a) by an instrument signed by the participant or signed on their behalf by another person in their presence and by their direction; or
>
> (b) by will,
>
> and may revoke the designation by either of those methods. S.Y. 2002, c. 197, s. 2

"Participant" is defined in s. 1 is "a person who is entitled to designate another person to receive the benefit under a plan, on the first person's death." "Plan" is further defined as including an RRSP. There is no dispute that Mr. Collett was a participant. Although "instrument" is not defined in the *RPBA,* the Sutherland's counsel does not dispute that the SCO can be viewed as an instrument for the purposes of the *RPBA.*

[43] The estate's counsel argued that Mr. Collett revoked Ms. Sutherland's designation as a beneficiary when he instructed his counsel to sign the SCO.

[44] Ms. Sutherland's counsel argued that s. 2 of the *RPBA* does not apply to these facts because:

a) The SCO in general, and the release clause in particular, is insufficiently specific because it does not make any reference to the RRSPs; and

b) The SCO was not personally signed by Mr. Collett, but rather was signed by his counsel and not in Mr. Collett's presence.

[45] My answer to the first argument raised by Ms. Sutherland's counsel is that there is no requirement in the *RPBA* that the instrument must specify the plan (in this case, the RRSP). I say this because of a simple matter of statutory interpretation. Sections 3 and 4 of the *RPBA* deal with designations and revocations of beneficiaries under a will. In either case, the designation or revocation is only effective if the will refers to the plan either generally or specifically. Because there is no such requirement in s. 2, I conclude that it was the intention of the legislature that the "instrument" in that context need not refer to the plan either generally or specifically. Sections 3 and 4 provide:

> 3 A designation in a will is effective only if it refers to the plan either generally or specifically. S.Y. 2002, c. 197, s. 3
>
> 4 A revocation in a will of a designation made by an instrument is not effective to revoke the designation made by the instrument unless the revocation refers to the plan or the designation either generally or specifically. S.Y. 2002, c. 197, s. 4

[46] My conclusion in this regard is supported by a decision from the Ontario Court of Appeal in *Burgess v. Burgess Estate* (2000), 52 O.R. (3d) 61. Desmond Burgess ("Desmond") worked for Canadian Tire, which had a Deferred Pension Sharing Plan ("DPSP"). In 1987, Desmond designated his wife, June, as a beneficiary of the DPSP. Desmond and June were married for many years before they agreed to separate in

1990. In 1994 they entered into a separation agreement in which they agreed to settle all issues between them. The couple were divorced in 1995. In 1996, Desmond married Bernadette Burgess. He died in 1999. Desmond's will left his estate in equal shares to Bernadette and to his three children by his first wife, June.

[47] The separation agreement specified that June Burgess would be entitled to one-half of the DPSP. Desmond made no change to the designation of June as the beneficiary of the DPSP prior to his death.

[48] After Desmond died, June asserted a claim, initially to one-half of the proceeds of the DPSP. Later, when Canadian Tire produced the original beneficiary designation, she sought payment of the entire proceeds. Bernadette opposed June's claim, saying that June should be limited to one-half of the proceeds to which she was entitled under the separation agreement.

[49] The release provision in the separation agreement stated:

> 19.01 Except as specifically provided, neither the Husband nor the Wife will make a claim to a share in any pension of the other, including but not limited to any company pension plans, registered retirement savings plans and registered home ownership savings plans, provided that the Wife shall be entitled to one-half of the benefits under the Husband's deferred profit sharing plan…

Earlier in the separation agreement, the parties also agreed to waive all claims that they may have in the future under the *Succession Law Reform Act ("SLRA").* Sections 50 and 51 of that *Act* are very similar in wording to s. 1 and 2 of the Yukon's *RPBA.*

[50] The Court of Appeal observed that the beneficiary designation Desmond gave to the Canadian Tire in 1987 was not irrevocable (para. 17). The same can be said in the case at bar.

[51] The Court also observed that the *SLRA "*does not require that revocation of a prior designation by instrument follow any particular form or formality*"* (para. 18). Again, the same can be said in the case at bar.

[52] In the result, the Court was satisfied that the release was capable of operating as a revocation of Desmond's earlier beneficiary designation in favour of June, subject only to the specific provision in the separation agreement limiting her to one half of the benefits under the DPSP:

> 24 In my view, the inescapable inference from these documents is that Desmond intended June's entitlement to be limited to one-half of the benefits under the DPSP and that he intended Bernadette and his children to share equally in the assets of his estate, including the other half of the benefits under that plan. A reading of the separation agreement in its entirety confirms an intention by both parties, Desmond and June, to achieve a final resolution of all claims, rights and entitlements each of them might have against the other and against the other's property, other than those - such as the benefits under the DPSP - for which the separation agreement makes specific provision. I find compelling the conclusion that the provisions of Art. 19.01 of the separation agreement operated to revoke Desmond's earlier beneficiary designation in favour of June. Just as the 1987 beneficiary declaration evidenced Desmond's intention that all of the proceeds under the DPSP be made payable to June, the 1994 separation agreement evidenced his subsequent intention to revoke that designation and to limit June's entitlement to one-half of the benefits under that plan. Article 19.01 effectively operated to implement that subsequent intention, in accordance with s. 51(1) of the SLRA. (my emphasis)

[53] I also find support for my conclusion on this issue in the cases of *Campbell Estate v. Campbell*, 2011 ONSC 5079 and *Purcell v. M.R.S. Trust Co.*, [2004] O.J. No. 3856 (S.C.).

[54] My answer to the second argument raised by Ms. Sutherland's counsel is that when Mr. Fairman signed the SCO, presumably a few days after the end of the judicial settlement conference, he did so as legal counsel acting on Mr. Collett's instructions, and also as agent on Mr. Collett's behalf, with full authority to bind Mr. Collett to the SCO. As such, there is no distinction between Mr. Fairman signing the SCO and Mr. Collett doing so. Putting it another way, it is as if Mr. Collett had signed the SCO himself. Accordingly, pursuant to s. 2(a) of the *FPBA* the SCO can be viewed as "an instrument signed by the participant" and there is no need to have regard to the second-half of that subparagraph "or signed on their behalf by another person in their presence and by their direction". Rather, I am persuaded by the estate's counsel that, pursuant to the Hansard excerpt concurrent with the enactment of the *FPBA*, the intention of the legislature with respect to the second-half of subparagraph 2(a) was to address a situation where a person is not able, for some reason, such as a physical disability, to sign the instrument by him or herself. There is no evidence that the second-half of subparagraph 2(a) was intended to address the situation where legal counsel is signing on behalf of the participant.

[55] I find support for my conclusion here in the British Columbia Court of Appeal case of *Hartslief v. Terra Nova Royalty Corp*., 2013 BCCA 417. In that case there was a dispute whether there was a binding contract agreed to between the parties in a conversation between their respective lawyers regarding the appellant's termination of the respondent's employment. The appellant's lawyer claimed at trial that he was proceeding on the assumption that a formal document would have to be signed before a binding agreement came into existence. The respondent's lawyer testified he

understood that he accepted an offer of settlement made earlier over the phone and a contract had thereby been formed, with the formal documentation and various non-essential terms still to be worked out. The trial judge found, on the totality of the evidence, that an agreement was reached and that no condition precedent remained. More importantly, the Court of Appeal agreed with comments made by the trial judge regarding the ability of a lawyer acting for a party to bind the client to terms of settlement:

> 14 With respect to Mr. Sangra's authority to bind his client, the trial judge cited *Sekhon v. Khangura*, 2009 BCSC 670, where the Court stated:
>
> > It is settled law that a solicitor acting for a party in settlement negotiations is acting as the agent of the client. The solicitor is presumed to have the authority to bind the client to the terms of settlement. There is no obligation on other parties to make enquiries regarding a solicitor's authority to settle a matter on a client's behalf. It is in the interests of the administration of justice that solicitors be free to complete settlements with solicitors without having to enquire about or be concerned with the actual authority of the solicitor: *Scherer v. Paletta*, [1966] O.J. No. 1017 (C.A.); *Adamoski v. Mercer*, [1984] B.C.J. No. 2872 (S.C.) at para. 6; *Harvey v. British Columbia Corps of Commissionaires*, 2002 BCPC 69 at para. 30. [At para. 40.]
>
> In my view, this statement of the law is a correct one, both in this province and in Ontario: see *Scherer v. Paletta* (1966) 57 D.L.R. (2d) 532 (Ont. C.A.), quoted in *Sekhon v. Khangura* 2009 BCSC 670 (B.C.S.C.), at para.111. (my emphasis)

[56] I also agree with the submission of the estate's counsel that statutes must be interpreted in such a way that absurdities are avoided: *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. In my view, it would be an absurd result if a judicial

Settlement Conference Order, based upon an agreement made by the parties, in the presence of their counsel and the Court was found to be insufficient for the purposes of the *RPBA*, simply because it was signed by counsel not in the presence of the client.

[57] Accordingly, I declare that, pursuant to the *RPBA*, the SCO revoked Ms. Sutherland's status as a beneficiary to Mr. Collett's RRSPs held at the Whitehorse, Yukon branch of Scotiabank.

Issue #3: Further, or in the alternative, is this an appropriate case to apply the "Slip Rule" to the SCO?

[58] Rule 43(22) provides:

> The court may at any time correct a clerical mistake in an order for an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter which should have been but was not adjudicated upon. (my emphasis)

[59] As noted above, in Mr. Collett's settlement brief, Mr. Fairman wrote the following proposal:

> Richard proposes that, in the interest of settlement, that any claims he has to pension plan benefits accumulated by Nina during the relationship would be waived and similarly, any claims Nina would make to RRSP contributions made by Richard to and the relationship would be waived.

[60] However, there was only one clause in the SCO expressly dealing with this topic, and it was limited to Ms. Sutherland's pension benefits:

> 2. The plaintiff shall retain her Government of Yukon Superannuation Pension benefits for her own use absolutely and the defendant shall have no claim against the plaintiff's pension benefits.

[61] Otherwise, aside from the release clause, there was no other provision in the SCO dealing with Mr. Collett's RRSPs.

[62] Thus, on the face of it, it is arguable that the SCO only addressed the first half of Mr. Fairman's proposal regarding the pension plan benefits, but not the second half of that proposal regarding the RRSP. Thus, it is reasonable to expect that the omitted clause might have mirrored clause 2 above, as follows:

> The defendant shall retain his RRSPs for his own use absolutely and the plaintiff shall have no claim against the defendant's RRSPs.

[63] Allowing the estate to amend the SCO in this fashion would make it reciprocal for each party regarding the pension/RRSP issue. It would also make the SCO consistent with Ms. Sutherland's expectation from her affidavit, which I quoted above, that she was aware she was "giving up the rights [she] might have…to claim some portion of what Richard had accumulated in the RRSP during [their] relationship".

[64] Ms. Sutherland's counsel submits that the SCO in this case is a consent order which reflects a contract between the parties, in addition to the order of court. Accordingly, the 'low bar' of the slip rule does not apply. Instead an applicant seeking to vary the terms of a consent order must meet the more onerous test relating to the rectification of contracts. Counsel cites *Shackleton v. Shackleton*, 1999 BCCA 704, for the proposition that, because of this, consent orders are not easily altered (para. 12). I do not take issue with this proposition, however it should also be noted that later in *Shackleton*, the Court of Appeal also stated, at para.14:

> …A consent order, reflecting an agreement between the parties, is an integrated whole unless specifically provided otherwise. Its terms are not unitary, but reflect upon each other in the balance…(my emphasis)

In my view, this statement supports, rather than detracts from, the appropriateness of rectification.

[65] Ms. Sutherland's counsel also relies upon the text by GHL Fridman, *The Law Contract in Canada,*(6th ed.), where the author says this about rectification:

> … The essence of rectification is to bring the document which was expressed or intended to be in pursuance of a prior agreement into harmony with that prior agreement. It deals with the situation where, contracting parties have reduced into writing the agreement reached by the negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole or in part, of the contract. What the court does is to alter the document, in accordance with the evidence, and then enforce the document as changed. Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly… (pp. 773-774)

[66] Once again, in my opinion, these statements support, rather than detract from, the appropriateness of rectification in the circumstances.

[67] Ms. Sutherland's counsel also made the following submissions in opposition rectification. He said that Mr. Collett's conduct, after the judicial settlement conference, in not taking any steps to revoke or change the beneficiary of his RRSP, supports the contrary conclusion that Mr. Collett did not intend that the SCO would prevent Ms. Sutherland from claiming the RRSP proceeds upon his death. Putting it another way, Mr. Collett was aware, from the time of the end of the relationship until his death, that Ms. Sutherland remained the designated beneficiary of the RRSP. Counsel referred to this repeatedly as "the key fact" on this application. In support of this key fact, Ms. Sutherland's counsel stressed that Mr. Collett would have continued to receive RRSP statements at his Chadburn Road home, at least on a quarterly basis, right up until the time of his death. Therefore, he must have known that Ms. Sutherland continued to remain as the beneficiary of the RRSP.

[68] I reject this argument for the following reasons.

[69] First, there is evidence that this was an acrimonious separation, that Mr. Collett felt bitterly towards Ms. Sutherland afterwards, and that he did not want her to have any claim to any aspect of his estate after the judicial settlement conference. This evidence has gone largely uncontradicted by Ms. Sutherland.

[70] Second, there is evidence, again largely uncontradicted, that Mr. Collett was not well organized, particularly when it came to paperwork, and did not have a great attention to detail. Further, there is evidence that he rarely opened mail relating to his finances and paid little attention to communication from his bank or other financial institutions.

[71] Third, there is a significant discrepancy between what Mr. Collett reported as the value of the RRSP in his financial statement sworn October 29, 2010 ($85,000) and his statement at the judicial settlement conference that he made, a “one-time” purchase of $15,000 worth of RRSPs over the period from 2003 to 2010. I infer from this Mr. Collett did not pay particular attention to the value of his RRSP. This also corroborates the evidence of Diana Rothgeb and Valerie Miller that Mr. Collett did not have a great attention to detail, such as the name of the beneficiary on the RRSP statements.

[72] Fourthly, it is important to remember that the previous beneficiary of the RRSPs was Francine Girouard. We also know that Mr. Collett’s relationship with Ms. Sutherland began in October 2003. However, Mr. Collett did not get around to changing the beneficiary designation on the RRSP until December 5, 2007, which was over four years later. This makes it much less surprising that Mr. Collett would have failed to take

action to change the beneficiary a second time from January 2010, until his death on October 13, 2015, over five years later.

[73] Accordingly, I order that the SCO be rectified to reflect the agreement reached by the parties, whereby each of them agreed to waive and forfeit any right or interest they had in the other's pension and/or RRSPs. Specifically, clause 2 of the SCO will be amended, such that the existing clause becomes subclause 2(a). Subclause (b) will read:

> The defendant shall retain his RRSPs for his own use absolutely and the plaintiff shall have no claim against the defendants RRSPs.

OTHER ISSUES

[74] Counsel for the parties devoted a considerable amount of effort in their written and oral submissions to arguments around unjust enrichment and constructive trust. However, I do not find it necessary to deal with those arguments in order to dispose of this application.

[75] I have not heard submissions from either counsel on costs. However, as the estate was substantially successful, I would expect costs should follow the event.

_____

GOWER J.