

PROBATE COURT OF NOVA SCOTIA
Citation: *Hiltz Estate v. Fitzgerald*, 2023 NSSC 259

Date: 202306027
Docket: ST. 490606
Probate: T16577
Registry: Truro

In the Matter of:

Holly Gail Peers, Personal Representative of the Estate of Carl Henry Hiltz

Moving Party

v.

Carroll Dianne Fitzgerald and Gertrude Rose Maxwell

Respondents

DECISION ON RULE 10.04 MOTION SEEKING ENFORCEMENT OF PURPORTED SETTLEMENT AGREEMENT
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Judge: The Honourable Justice Jeffrey R. Hunt

Heard: June 27, 2023, in Truro, Nova Scotia

Oral Decision: August 16, 2023

Counsel: Sandra L. McCulloch, for the Moving Party
Carroll Fitzgerald and Rose Maxwell, self-represented
Respondents

By the Court: (orally)

Background

[1] Holly Gail Peers, as Personal Representative of the Estate of Carl Henry Hiltz, is before the Court seeking to enforce what she asserts was a settlement agreement entered into by way of Minutes of Settlement executed on December 17, 2021. On March 17, 2023 the Estate advanced a motion, pursuant to Civil Procedure Rule 10.04, stating that the Respondents were refusing to abide by the terms of the agreement.

[2] There are five interested parties in this matter, being the five adult children of the deceased. Three of these individuals support the motion, with the remaining two siblings arguing that no valid agreement was reached.

[3] I intend to outline the background of the dispute, the circumstances of the settlement conference that led to the signing of Minutes of Settlement, and the seeming inability to bring this painful dispute to a close.

Record on the Motion

[4] The Record on the motion consists of the following:

1. Notice of Motion filed by Personal Representative;
2. Notices of Objection filed by two responding parties;

3. Affidavit of Holly Peers dated March 17, 2023;
4. Solicitor's Affidavit dated March 15, 2023;
5. Affidavit of Rose Maxwell dated May 23, 2023;
6. *Viva voce* evidence of Carroll Fitzgerald given at the motion hearing;
7. The court record of December 17, 2021.

Issues

- 1. Was there an enforceable agreement among the parties?**
 - 1.1 Was there an intention to reach a mutually enforceable resolution of the dispute?**
 - 1.2 Was there mutual agreement on all points necessary to achieve certainty of terms?**
 - 1.3 Were there any issues of party incapacity, failure to disclose material facts, mistake, inequality of bargaining power or other circumstances that would vitiate any agreement and make it unjust to declare and enforce the terms?**
- 2. If the answer to Question 1 is yes, do the Minutes of Settlement dated December 17, 2021 represent the terms of such agreement?**
- 3. If the answer to Question 2 is yes, what orders of the Court are necessary to give effect to the terms?**

Position of the Moving Party

[5] Holly Peers, as representative of the Estate, says there has been a full and complete resolution of this long-delayed matter. The terms of the settlement are captured by detailed Minutes of Settlement dated December 17, 2021.

[6] The final version of the signed Minutes of Settlement was negotiated at a Judicial Settlement Conference. The Estate points out that at the conclusion of the Conference the Court made inquiries of all parties confirming their intentions and agreement. The transcript of these exchanges is part of the record on this motion.

[7] The morning following the settlement conference, Carroll Fitzgerald purported to reject the settlement. Her note to the parties refers to a ‘cooling off period’ within which she was free to change her mind. The Estate says such an effort on her part must be rejected. The critical question is whether a valid contract of settlement was achieved. If this is the case, then an order confirming and enforcing the terms ought to be granted.

[8] With respect to the second Respondent, Rose Maxwell, the Estate says she too entered into a full and binding resolution. She was represented throughout by counsel. The Estate submits that the Court ought to order the enforcement of the terms agreed to by Ms. Maxwell.

[9] The Estate seeks costs from both Respondents.

Position of the Respondents

[10] In Carroll Fitzgerald's written material she submits that she has been the victim of a conspiracy of her three siblings and the justice system. She feels there has been a campaign to lie about her and manipulate and coerce her.

[11] She asserts that there was a cooling off period after the settlement and, during that cooling off period, she withdrew her agreement to resolve the matter. She now wants a trial.

[12] It is more challenging to determine the position of Rose Maxwell. One of the steps required of her under the settlement was the filing of a consent dismissal of a Supreme Court proceeding (ST No. 495852) launched by her against her late father's Estate. After parting ways with her lawyer following the Settlement Conference, she did communicate to the Truro Prothonotary that she wished to withdraw that proceeding. There is however a legal distinction between a dismissal and a withdrawal. The Estate does not consent to the withdrawal (consent would be required under the Rules), but rather seeks a true dismissal.

[13] Even after the distinction between withdrawal and dismissal was brought to her attention, Ms. Maxwell declined to remedy this deficiency. Further she has failed to execute the still outstanding final release document required of her under the Minutes of Settlement.

Discussion

[14] I listed above the items that form the record on this motion. I do not intend to repeat everything contained in those materials. I have reviewed everything before the Court, as well as the evidence and submissions given at the hearing.

[15] This proceeding flows from a protracted dispute stemming from the 2018 death of Carl Henry Hiltz. Mr. Hiltz was father of the five interested parties in this matter, all of whom participated in the Judicial Settlement Conference.

[16] The deceased had executed a Will on August 5, 2017. The document met the requirements for presumptive validity under the *Wills Act*. The document named Ms. Fitzgerald as Personal Representative of his estate. It included some provision for each of his five children.

[17] Following his death, a document was found at Mr. Hiltz's home dated December 1, 2017 which arguably appeared to be some variety of a handwritten testamentary document. While the writing did mention the names of all five of the children, it did not include Ms. Maxwell as a beneficiary, nor did it fully provide for the distribution of the residue of the Estate. The four other siblings named as beneficiaries in the holographic document met and agreed that Probate would be sought on the basis of the formal 2017 Will and not the December document.

Executorship was renounced by Ms. Fitzgerald, with this role assumed by Holly Peers as alternate executrix.

[18] This initial period of goodwill was quickly replaced by a number of years of conflict and acrimony. Estate administration did progress, but it was marked by increasing struggle among the siblings. Lines became drawn which put Holly Peers, Donna Wentzell and Karl Hiltz on one side, with Ms. Fitzgerald and Ms. Maxwell on the other.

[19] Over time various applications were advanced questioning Carl Hiltz's testamentary capacity as well the Personal Representative's administration of the Estate. Ms. Maxwell filed the aforementioned Supreme Court action seeking relief against the Estate owing to alleged historical misconduct against her by her deceased father.

Complicating Factors

[20] Prior to his death Carl Hiltz had taken a number of steps that resulted in additional complexity and challenges respecting the settling of the Estate. For instance, he had created an alter ego trust which held certain of his assets. Much like the December 2017 holographic document, the alter ego trust excluded Ms. Maxwell in favour, once again, of the other four siblings. This was addressed in the

December 2021 settlement and, of necessity, the Trust was included as a party to the concluded Minutes of Settlement.

[21] During his lifetime the deceased had also taken other financial steps *vis a vis* his children which impacted how the settlement unfolded. First, in or about February 2015, Carl Hiltz had transferred to Rose Maxwell alone the sum of \$100,000. Similar sums were not transferred to any of Carl Hiltz's other children during his lifetime.

[22] Further, by way of a deed signed June 6, 2016, Carl Hiltz transferred ownership of his residence out of his name alone and into the joint names (with right of survivorship) of himself and Carroll Fitzgerald. This transfer added to the friction among the parties as it was Ms. Peers' position that, at least at the outset of the Estate's administration, Ms. Fitzgerald had expressed an intention to sell the home with the proceeds to be divided equally among the siblings. This did not remain the case.

Settlement Positions in the Period Preceding Judicial Settlement Conference

[23] In the months leading up the Judicial Settlement Conference much effort was expended on settlement discussions. At that time Ms. Fitzgerald was represented by counsel, as was Ms. Maxwell. At the Judicial Settlement

Conference, Ms. Maxwell still had her lawyer, Adam Harris, who represented her throughout. Ms. Fitzgerald had discharged her lawyer but was present with her daughter, Savayda Jarone.

[24] I will outline in general the settlement moves engaged in prior to the Judicial Settlement Conference as these set the context for how matters progressed on December 17, 2021.

[25] Some time prior to the Judicial Settlement Conference, the Estate advanced an offer which accounted for the cash advance to Ms. Maxwell and the home received by Ms. Fitzgerald but, after accounting for these set-offs, provided that the Estate and Alter Ego Trust would be divided equally. Ms. Peers, Mr. Hiltz and Ms. Wentzell endorsed this proposal.

[26] In many ways this proposal still formed the core of the resolution at the Judicial Settlement Conference. The changes that did take place were alterations in Ms. Fitzgerald's favour.

[27] To the above proposal Ms. Fitzgerald's then legal counsel, Brad Yuill, responded with a counteroffer which included Ms. Fitzgerald solely retaining the home. Otherwise the offer accepted that all residual financial resources in the Estate or Trust be divided equally among all parties.

[28] On September 17, 2020, the Proctor for the Estate circulated proposed draft Minutes of Settlement to all parties. Following further communications between the parties, a slightly revised draft was circulated on March 23, 2021. These subsequent proposals conceded that the home would be retained solely by Ms. Fitzgerald with none of its value having to be accounted for or deducted in any way. The settlement documents further went into substantial detail about various items of personal property which remained controversial.

[29] Unfortunately, despite this apparent narrowing of the gap between the positions of the parties, no final resolution crystalized. There was a great deal of frustration on all sides. The Estate and the three siblings aligned on that side perceived that they had conceded a great deal to Ms. Fitzgerald, yet the matter was still unresolved. It was in this time period that Ms. Fitzgerald terminated her relationship with her solicitor.

[30] With the impasse seemingly intractable, all parties agreed to and ultimately attended the Judicial Settlement Conference at Truro Supreme Court. All parties were present either in person or, in the case of Ms. Maxwell, by video. Adam Harris, as counsel to Ms. Maxwell was personally present.

December 17, 2021

[31] In advance of the Conference, the Estate filed a brief and book of disclosure, which included a variety of materials previously circulated among the parties. While the Court was seeing these for the first time, they were familiar documents to the litigants. These included the draft Minutes of Settlement. The brief and materials were sent to all parties. A copy was sent to the address believed to be the one Ms. Fitzgerald was using as a self represented individual. At the Judicial Settlement Conference she advised she had not received the package. A further copy was offered to her. Given that the documentary materials in these submissions consisted of items previously circulated to all parties, this issue was not seen as overly problematic.

[32] Perhaps more materially, the Estate also circulated at the beginning of the Judicial Settlement Conference, an up-to-date accounting of the Estate's administration and current statements reflecting the then-current values of the Estate and Trust. All parties stated they wished the Conference to proceed and expressed a desire to attempt to conclude the matter.

[33] The Conference unfolded over approximately 3.5 hours. After commencing with all parties together for opening remarks and initial discussion, the parties moved to break out rooms with myself as judge moving between rooms.

[34] Over the course of the Judicial Settlement Conference, the previously circulated draft Minutes of Settlement served as the beginning point for further discussion. This made imminent sense as the document did reflect some progress that the parties had previously managed to achieve on their own, and was highly detailed down to the point of addressing individual items of contested personal property.

[35] The parties agreed to some changes to the draft Minutes of Settlement. Things such as a persistently troubling dispute over certain oil bills were addressed. Essentially the Estate conceded these to Ms. Fitzgerald. This was a concession driven more by exhaustion over the issue as opposed to legal weakness in their position. What I observed was that the Estate was simply exhausted by her inflexibility on the issue and conceded. It also made sense for the Estate to give way on points such as these. While they had a strong legal position, the cost of delay was the greater issue.

[36] Frankly speaking, Ms. Fitzgerald's position was a triumph of intransigence. The big issue had already been conceded to her – that being her sole ownership of the home with no accounting or set-off required within the Estate and Trust distribution.

[37] During the course of the Judicial Settlement Conference, counsel for the Estate revised the draft Minutes to reflect agreed changes. A revised draft, plus a helpful “redline” version showing the changes, was distributed. A draft release was also prepared and provided to Ms. Fitzgerald. It was understood that all parties would be required to sign the same form of release. The Estate felt that, given the history, such releases were necessary to permit closure of the Estate. Any reasonable assessment of the situation must be that this was accurate.

[38] The Minutes also provided that Ms. Maxwell’s Probate Court application and separate Supreme Court action would be concluded by way of consent dismissal orders. The Minutes also provided that all parties would sign a release in favour of the Estate and Ms. Peers (as Personal Representative).

[39] After documents were circulated, all parties, including Mr. Harris on Ms. Maxwell’s behalf, signed the Minutes of Settlement as revised. Once documents were signed the parties returned to the courtroom where inquiries were made of all parties and the settlement was read into the record. A transcript of these inquiries and the discussion formed part of the record on this Application.

[40] The transcript reveals no concerns about the settlement, the process or disclosure circulated. The Court independently observed no such issues. It was

canvassed that this was now an agreement enforceable by the Court. No objections were voiced.

Failure to Adhere to Settlement

[41] On December 18, 2021, the day after the Judicial Settlement Conference, Ms. Fitzgerald wrote to all interested parties and to the Court, attempting to revoke her agreement based on her invocation of a “cooling off period”.

[42] Ms. Fitzgerald has communicated in the time since the settlement conference that she does not consider herself bound by any settlement.

[43] As for Ms. Maxwell, in the period following the Judicial Settlement Conference, she discharged Adam Harris as her counsel. Remaining outstanding at that time were her signatures on the consent dismissal order and final release document. The Minutes of Settlement themselves had been signed on December 17, 2021 by her counsel with her acceptance and instructions to do so confirmed on the record through her video attendance.

[44] In June of 2022, Ms. Maxwell wrote to Truro Supreme Court withdrawing her filed Action against her father’s estate. The Estate remains concerned

nonetheless as a withdrawal carries different legal ramifications versus a true dismissal. Also outstanding is the release document.

[45] The Estate seeks to close these remaining details so final distribution can proceed as outlined in the Minutes of Settlement.

Applicable Law

[46] There can be no reasonable disagreement with respect to the applicable law.

[47] This motion proceeded pursuant to Civil Procedure Rule 10.04 which provides as follows:

10.04 Enforcement of settlement agreement or arbitration award

(1) A party who alleges that, after a proceeding was started, the parties reached agreement for settlement of the proceeding or of a claim in the proceeding may make a motion for an order giving effect to the agreement.

(2) The judge who hears the motion may do any of the following:

- a. declare the agreement was, or was not, made and is, or is not, enforceable;
- b. declare the terms of an agreement;
- c. grant an order enforcing an agreement according to its terms;
- d. order a trial under Rule 4 – Action or a hearing under Rule 5 – Application and give directions about the issues to be determined.

[48] It is not controversial that settlement agreements, while specialized in nature, are contracts and subject to the same requirements in law: see **McMillan Estate v. Booth**, 2021 NSSC 284.

[49] It is important that a Court acting under Rule 10.04 not erroneously move to considering or declaring the terms of the purported agreement before independently determining whether a true agreement was reached: see **Piper v. Piper**, 2018 NSCA 53.

[50] Whether there was an enforceable agreement will be determined through consideration of the following questions:

1. Was there an intention to reach a mutually enforceable resolution of the dispute?
2. Was there mutual agreement on all terms necessary to do so?
3. Were there any issues of party incapacity, failure to disclose material facts, mistake, inequality of bargaining power or other circumstances that would make it unjust to declare and enforce the terms?

[51] Only once these questions are addressed can the Court move on to the issue of what the enforceable terms may be. In many cases the determination of the terms is the more complicated part of the analysis. There may be agreement that some deal was reached but, due perhaps to the way the negotiations unfolded, there is disagreement on a particular term or terms.

[52] Given the existence of Minutes of Settlement, and signed release documents, the more contentious issue in this case is the existence of the agreement itself. If it can be established that there existed a valid intention to settle, and in the absence of any vitiating circumstances, the particular terms may be easy to establish from the Minutes of Settlement.

Issue 1 - Was there an enforceable agreement between the parties?

[53] To answer this question I will assess matters of intention, certainty of terms, and any possible vitiation of agreement.

[54] First let me identify and acknowledge the unusual aspect of a Civil Procedure Rule 10.04 Motion. Our Rules are structured such that the judge who hears the Judicial Settlement Conference is required to evaluate the proceeding and making determinations about enforceability. Presumably this is the case because that judge is in a position to make findings based upon their own knowledge of the process and how matters transpired. Given this expectation I will make a number of specific findings.

Misdirected Settlement Brief

[55] I want to briefly address the issue of whether any prejudice was occasioned by the apparent delivery of the Estate's settlement brief to an old address for Ms. Fitzgerald.

[56] The brief contained material designed to bring the Court up to date on what had transpired up to that time. All the important material had previously been exchanged, much or all of it when Ms. Fitzgerald was represented by counsel.

[57] It did not contain any dramatic new positions or proposals. It essentially outlined the 'battlelines' as these had existed for a long period of near stalemate.

[58] Simply put, there were no shockers or bombshells in there. However, if Ms. Fitzgerald had expressed a desire to adjourn, the Court would not have denied her that request. But this did not occur. A further copy was offered to her. She stated this was not necessary and she knew what the position of the Estate was. And indeed she did. Ms. Fitzgerald consistently displayed a detailed grasp of all the positions, interests, duelling offers, and litigation postures adopted over a period of years.

[59] The Estate accounting material produced for the Judicial Settlement Conference constituted the most recent and up to date disclosure available. It was something that all parties had recognized as important to have. All parties had it

and had full opportunity to review it. There was in fact nothing dramatically new in the document, but it did allow the parties to have in their hands the most current financial picture.

[60] Ms. Fitzgerald wanted the Judicial Settlement Conference to proceed. While she had dismissed her lawyer she was supported throughout by her daughter, who was extremely capable. Ms. Fitzgerald herself is a retired professional. There were simply no issues around the available materials that prejudiced anyone.

Participants were amply informed of the status of the Estate and Trust as of the point of the Judicial Settlement Conference.

Dynamics of the Conference

[61] In many ways, the dynamic of the Judicial Settlement Conference was that Ms. Fitzgerald wanted to demonstrate that she was in charge. Far from a situation where her will was overborne, the feel of the day was that the process was being driven by her, and absent further bending in her direction, the Judicial Settlement Conference was not going to be successful.

[62] Keeping in mind that the primary objective of the Estate was closure, it made sense for them to give way to Ms. Fitzgerald on some further matters and this in fact is what occurred. And in the situation, this made complete sense. The

imperative for the Estate was closure. As galling as it likely was to bend on matters such as the fuel expense, and the status of the Martha Avenue property, it made sense for the Estate to do so to gain the critical objective of final resolution.

[63] Ms. Fitzgerald knew exactly what was important to her in this proceeding. I believed then and now that she wanted to exert her will over her siblings. She wanted and maybe even needed to be seen as the one driving the boat.

[64] In terms of actual negotiating points, she wanted the home property to be hers alone, with no deduction against her equal share of the Estate or Trust. As a lesser issue, she wanted the satisfaction of forcing the other siblings to accept that she would not bear the cost of the fuel oil for the home, despite the fact that at law this very likely ought to have been her expense alone. She forced this concession largely through sheer unwillingness to bend. Right or wrong it proved to be an effective tactic as the Estate sensibly yielded in the hope it would be the price of peace and closure.

[65] There is a view is that, on paper, Ms. Fitzgerald might be seen as the party who gained most from the process that she now seeks to disavow. I say on paper because in reality the true priority of the Estate had always been to get closure. It made absolute sense for the Estate in these circumstances to give ground if this

could be achieved. It is also evident that no matter what other gains Ms. Fitzgerald has achieved, her approach throughout this matter has certainly continued to further damage her relationship with all but one of her siblings. Whether what she may have gained is really worth that, only she can say.

[66] As to Ms. Maxwell, she was represented by counsel throughout the period leading to December 17 as well as at the Conference itself. I have struggled to understand why she has failed to follow through on the very few steps remaining on her part to finalize the matter. She acted to withdraw her personal claim against her father's estate, but not by way of consent dismissal as required. She will not return the signed release document.

Authority of Counsel

[67] If it is necessary to make a finding on the subject of the authority of Ms. Maxwell's lawyer, Adam Harris, I have no difficulty making such a finding. In fact Ms. Maxwell confirmed his authority to sign the Minutes of Settlement in real time via her video appearance at the Conference.

[68] Occasionally there are complex questions around a solicitor's authority to execute documents on behalf of their absent clients. This is not one of those

scenarios. He had authority. When asked, Ms. Maxwell confirmed this authority directly to the Court.

[69] More generally, Ms. Maxwell can also be seen as a party who has gained something in this overall struggle. She did not have to fight the battle over the possible holographic will, a document which had excluded her. This was a significant benefit to her in saved time, expense and litigation risk.

Conclusions on Issue 1

[70] Turning to the specific determinations to be made on this issue, I am mindful of the following comments of the Nova Scotia Court of Appeal in **United Gulf v.**

Iskandar, 2008 NSCA 71. Justice Cromwell speaking for the Court stated:

82 The judge ... should ... determine from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty: see G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed.

[71] Having been directly exposed to the back and forth among the parties at the Judicial Settlement Conference, and having considered everything that transpired, I am fully satisfied that an objective bystander, aware of the facts and circumstances, would conclude there was clear and unequivocal intention among the parties to resolve the matter.

[72] Whether Ms. Fitzgerald later had ‘buyer’s remorse’ is a different issue. In the absence of vitiating circumstances, a mere change of heart will not undermine a fully realized mutual intention to settle. In this context, there is no such doctrine as a “cooling off period”, to use Ms. Fitzgerald’s term.

[73] With respect to both contesting parties, I further find there were no issues of mistake, coercion, inequality of bargaining power or otherwise that could serve to undermine the intention to reach settlement.

[74] Accordingly I conclude there was clear contractual intention. There was a meeting of the minds over the essential terms, and there exist no circumstances which would serve to vitiate the agreement of the parties. The parties in this matter reached a valid and enforceable settlement.

[75] The Civil Procedure Rules further require that I confirm the particular terms of the resolution agreement.

Issue 2 – Terms of Settlement

[76] As to the terms, as I noted earlier, in many cases of this nature the heart of the issue is a dispute over the particular terms. For instance, the parties might agree there was a settlement but given the manner in which the discussions took place,

perhaps through multiple exchanged emails over weeks or months, a dispute arises with respect to whether particular terms were or were not part of the agreement.

[77] That is not the issue here. In this case we have a complete and highly detailed set of written terms. Given my findings on Issue 1, it follows logically that the terms of settlement are those found in the signed Minutes of Settlement.

[78] The document of December 17, 2021 reflects a complete and enforceable contract of resolution.

[79] As to the issue of the outstanding final release document from Ms. Maxwell - our Court of Appeal has spoken on a few occasions to the point that a settlement will carry with it the implication that a release will be supplied. See for example **Sinanan v. Woodyer**, 1999 NSCA 74 at para. 38. In the particular circumstances of this case, no implication is required. There was specific reference to the necessary form of the release document.

Issue 3 – Form of Court Order

[80] Having determined that the Minutes of Settlement reflect the valid and enforceable intentions of the parties. I will grant an order enforcing its terms.

[81] It seems apparent there ought to be a specific term dispensing with the necessity of the signature of Ms. Maxwell on the draft release. Such a term is not necessary with respect to Ms. Fitzgerald, for whom a signed and witnessed release exists.

[82] Additionally, it will presumably be necessary to order that the separately filed proceeding, known as TRU No. 495852, will stand dismissed out of the Supreme Court. While the present motion is in the Probate Court, I have concurrent jurisdiction in the Supreme Court to make that necessary order.

[83] I will hear from the parties regarding whether they believe other specific order terms may be needed to give effect to this ruling.

Summary of Conclusions

[84] It is the conclusion of the Court that the parties to this dispute did reach an enforceable agreement to resolve the matter. The two Respondents subsequently purported to disavow the settlement. There is no legal basis for them to do so.

[85] Pursuant to Civil Procedure Rule 10.04, I grant an order enforcing the agreement according to its terms, which I find are contained in the executed Minutes of Settlement.

[86] With respect to costs, normally I would invite parties to attempt to reach a resolution on this aspect of the proceeding. In this case, this would not be a productive exercise. More time and money would be wasted to no good effect.

[87] Accordingly, I am satisfied that the most cost-effective option is to hear from all parties, at this time, on the matter of litigation costs.

Hunt, J.