SUPREME COURT OF NOVA SCOTIA
Citation: *Fralic v. Drouin Estate,* 2014 NSSC 344

Date: 20140912
Docket: Hfx. No. 416677
Registry: Halifax

Between:

Sharon Georgina Fralic

Applicant

v.

Colleen Pearl Graham, as Executrix of the Estate of Marco Joseph Robert Drouin and Colleen Pearl Graham

Respondents

Revised Decision:	This decision has been corrected on September 29,2014 and replaces the previously released decisions.
Judge:	The Honourable Justice Patrick J. Murray
Heard:	February 19 and 20, 2014, in Halifax, Nova Scotia
Final Written Submissions:	April 3, 2014
Counsel:	Daniel S. Walker, for Sharon Georgina Fralic Judith A. Schoen, for Colleen Pearl Graham, as Executrix of the Estate of Marco Joseph Robert Drouin and Colleen Pearl Graham

By the Court:

Introduction

[1] The Applicant, Sharon Fralic, married Marco Drouin in early 2003. Together they had a son Nicolas who was born in late 2003. The parties were married for 5 years before they divorced in 2008. Nicolas was 5 years old at that time.

[2] In 2006, the parties signed a Separation Agreement with a life insurance clause. Under the Agreement Mr. Drouin was obligated to maintain life insurance coverage, naming Ms. Fralic as beneficiary in trust for their son.

[3] Mr. Drouin married the Respondent, Colleen Graham, in 2011. In 2012 Mr. Drouin became ill. He was diagnosed with cancer. Unfortunately, the illness progressed quickly. He passed away on February 7, 2013. Nicolas was 9 years of age at the time. Nicolas was born October 4, 2003 and is now 10 years of age.

[4] After the divorce and prior to his death, Marco made changes to the insurance policy. Ms. Fralic maintains this was contrary to the Agreement and contrary to the Corollary Relief Judgment (CRJ) dated June 26, 2008 and issued at the time of their divorce in 2008.

[5] Ms. Fralic seeks an Order to enforce the life insurance provision of the Divorce Order, as contained in the CRJ. Mr. Drouin's Estate opposes the application, because the changes were discussed with Ms. Fralic, and she agreed to the changes before he made them. It appears the Estate has insufficient funds. The Applicant seeks an order against Ms. Graham personally.

Issues

1. Was clause 28 of the Separation Agreement dated March 2, 2006 incorporated into the CRJ?
2. Is the Applicant, Sharon Fralic entitled to an order directing payment to her in trust for her son Nicolas, remaining proceeds under the insurance policy held by her late husband, Marco Joseph Robert Drouin, who died on February 7, 2013?

3. Is the Applicant, Sharon Fralic, entitled to an order directing payment by the Estate to her in trust for her son Nicolas, the $50,000. advanced to Mr. Drouin on the policy of life insurance prior to his death?

4. Is the Applicant, Sharon Fralic, entitled to an order directing the Respondent Colleen Graham to pay all or a portion of the $50,000. advanced to Mr. Drouin?

[6] An underlying issue is whether the parties agreed to change the designated beneficiary on the life insurance policy from the Applicant alone in trust for Nicolas, to Nicolas and the Respondent, Colleen Graham as primary beneficiaries in equal shares, and such further changes as were made by the late Mr. Drouin.

[7] In addition, a further issue is whether a constructive trust should be granted and whether in that regard , there was: 1) an enrichment to the Defendant; 2) a deprivation to the Plaintiff ; and 3) the absence of a juristic reason for the enrichment.

[8] What is not in dispute is that the insurance proceeds paid into court of $147,355.75, will be held in trust for Nicolas Drouin. The Respondents have indicated the funds will be held in trust for Nicolas Drouin, as was the intent of the late Mr. Drouin. They say, however, that the trustee should be the Respondent, Colleen Graham, and not the Applicant.

[9] The Corollary Relief Judgement called for the Applicant, Sharon Fralic to be the trustee for the full amount, to be held in trust for her son.

[10] Further, the Respondents have indicated that this application is not about supporting the children of the Respondent, Colleen Graham, or any additional dependants acquired by the late Marco Drouin, by virtue of his marriage to Colleen Graham. In this regard, they maintain that cases authorities such as **Estate of Brian Albert Schorlemer and Elaine Debaghi** v. **Paulette Schorlemer**, 2006 ONSC 42364, have limited applicability.

[11] Having reviewed the affidavit evidence, the written and oral submissions, as well the exhibits tendered at the application hearing, what lies at the heart of this matter was whether an agreement to change the beneficiary designations had been reached and whether the law of constructive trusts in Canada, would justify the orders being sought by the Applicant.

[12] There is also the related issue of whether the insurance designation and the provisions of the *Insurance Act* would prevent the Applicant from recovering from the Respondents.

Preliminary Procedural Matters

[13] On August 20, 2013, the Court issued a consent order by which Ms. Graham was appointed to represent the Estate in the within proceeding, pursuant to section 7 of the *Survival of Actions Act* of Nova Scotia, and *Rule 36.12* of the *Civil Procedure Rules* of Nova Scotia.

[14] On or about April 19, 2013, Manulife Financial paid into court the sum of $147,355.75, representing 42% of the $350,000. coverage, adjusted for interest, and $500. in costs related to Manulife's application; pursuant to the *Insurance Act* of Nova Scotia (see Ms. Fralic's first affidavit, at para.48).

Position of the Parties

The Applicant's Position

[15] The Applicant, takes the position that she's entitled to the proceeds of the insurance policy by way of a constructive trust. She submits that the late Marco Drouin failed to comply with the terms of the 2006 Separation Agreement as well as the 2008 CRJ incorporating the terms of the agreement.

[16] The Agreement required the total insurance proceeds in the amount of $400,000. to be payable to Sharon Fralic, mother other Nicolas in trust for him. Ms. Fralic states there was never any agreement between her and her former husband, Marco Drouin, that would allow him to change the terms of the CRJ.

[17] To the contrary, while there may have been discussions, the end result was that Ms. Fralic, informed Mr. Drouin that she would be strictly enforcing the terms of the Separation Agreement in the best interests of her son. The so called, "text messages", which the Respondent refers to as evidence of their agreement, do not show there was an agreement to change the designation, required by the CRJ.

The Respondents' Position - Estate of Mr. Drouin and Colleen Pearl Graham

[18] The Respondents' position is that there is no basis for finding a constructive trust and that Ms. Graham is entitled to hold the proceeds of the policy.

[19] Further, they state that in 2011 Mr. Drouin and the Applicant agreed to change the designated beneficiary on the life insurance policy. The Agreement was that the Applicant's father, would be the beneficiary, in trust for Nicolas for one-half of the proceeds and the Respondent would be the beneficiary of the other one-half. This is evidenced, say the Respondents, by Mr. Drouin being supplied with the proper name, and proper address for the Applicant's father, Graham Fralic at that time.

[20] The Respondents submit that the Applicant agreed that the funds would be divided as such, and that Ms. Fralic would have no further claim to the life insurance policy. The Respondents maintain there were various changes made to the policy over time, as a result of discussions between the parties.

[21] They state it became apparent that the Applicant was attempting to renege on the previous agreements, prior to Mr. Drouin's death. He became concerned that the "SISIP policy" could be tied up in litigation. Accordingly, he made arrangements to designate the Respondent, Colleen Graham, as being entitled to 42% of the SISIP policy. This represents the $147, 000. paid into court**.**

[22] Ms. Graham, has made it clear that she will hold the funds in trust for Nicolas' benefit, as agreed to with Mr. Drouin. She maintains in this Application that she will continue to do so, if the Court agrees with her position in this matter.

Background

[23] The CRJ issued with the Divorce Judgment obligated Mr. Drouin to maintain the insurance coverages including the Service Income Security Insurance Plan ("SISIP") in place through his employment as set out in the parties' Separation Agreement. The CRJ was never varied.

[24] Subsequent to the Separation Agreement and the issuance of the CRJ, Mr. Drouin made several changes to the beneficiary designation on the SISIP policy. According to the Applicant, he made them each time, without notifying her or obtaining her agreement. (see paras. 36 and 37 of Fralic's first affidavit)

[25] The changes which Mr. Drouin made were as follows: 1) September 23, 2011, the policy was changed from Mr. Drouin's son Nicolas being the sole and primary beneficiary, with Sharon Fralic as trustee, to Nicolas being a 50% beneficiary and Colleen Graham being the other 50% beneficiary. There were two

trustees named for the funds payable to Nicolas. Those were Colleen Graham and father of the Applicant, Graham Fralic.

[26] The second change made occurred on June 8, 2012. Once again the life insurance policy in the amount of $400,000. remained, with Colleen Graham a 50% beneficiary and Mr. Drouin's son, Nicolas Drouin being the other 50% beneficiary. This time however, Colleen Graham was made the sole trustee for Nicolas.

[27] The third and final change occurred on December 11, 2012, when Mr. Drouin changed the beneficiary designation to 42% for Colleen Graham and 58% for Nicolas Drouin. This time he changed the trustee for Nicolas Graham back to his mother, the Applicant, solely for the funds payable to Nicolas. Ms. Graham has received these funds representing 58% of the $400,000., by cheque in the amount of $203,495.20. She received them in trust for Nicolas on or about March 11, 2013, from Manulife Financial as underwriters of the SISIP policy. This is confirmed by Valerie Pouliot of Manulife, in her affidavit (paragraph 21), attached as Exhibit "A" to Ms. Fralic's first affidavit; as follows:

> 21. Nicolas' portion of the life insurance proceeds ($203,000.00, plus accumulated non-contractual interest from the date of death of Drouin of $578.14, less accumulated interest on the Advance Benefit payment of $82,.94) totaling $203,495.20 was paid to Fralic In Trust for Nicolas on or about March 11, 2013. Attached to this my Affidavit as Exhibit "O" is a copy of my letter to Fralic forwarding these funds.

Issue #1 Was clause 28 of the Separation Agreement dated March 2, 2006 incorporated into the CRJ?

[28] At the conclusion of the hearing the Court observed that the CRJ did not seem to specifically incorporate clause 28 of the Separation Agreement, nor was there a provision of the CRJ incorporating the agreement as a whole.

[29] Clause 28 of the Separation Agreement reads as follows:

> The Husband will maintain the current SISIP life insurance policy on his life in a minimum amount of $400,000.00, naming the Wife as beneficiary in trust for the child for so long as there will be child support payable pursuant to this agreement or any renewal, extension or substitution thereof by agreement or Court Order.

[30] I asked counsel to submit post trial briefs which were received on March 14, 2014 from the Respondent, and on April 3, 2014 from the Applicant.

[31] The Respondents argue that some, but not all of the terms of the Minutes of Settlement Agreement were incorporated into the CRJ. Paragraph 6 of the CRJ states:

> 6. The Respondent shall continue the medical, dental and drug plan coverage for the child available through his present or subsequent employer and maintain the plan in place without change including the life insurance policy for the wife, along with medical and dental coverage already in place and set out in the Separation Agreement dated March 2, 2006.

[32] The Respondents rely on the doctrine of merger so as to nullify the effect of clause 28. The Respondents submit the Minutes of Settlement Agreement merged with the CRJ and were subsumed by the CRJ and thus are no longer in force or effect.

[33] The Respondents submit that only some portions of the Agreement are incorporated in the CRJ and the Agreement pre-dates the CRJ. It is conceded that there is no clause in the CRJ which varied the terms of the Separation Agreement.

[34] In their post-trial brief the Respondents submit that those portions of the Agreement, not specifically referenced, are now extinguished by the principles of merger.

[35] I have considered these submissions and reviewed the cases submitted in support of the Respondents' merger argument.

[36] In **Fitzpatrick** v. **Fitzpatrick**, [1985] B.C.J. No. 2768, the Plaintiff brought an action in British Columbia to set aside a Separation Agreement. The Defendant then commenced a divorce proceeding in Washington. A property settlement agreement was reached and the Plaintiff consented to it forming part of the Divorce Judgment. The action to set aside was dismissed as part of the settlement. The court ruled that the settlement agreement, merged with the judgment of the Washington Court. The Plaintiff's consent to make the settlement part of the divorce judgement was an important factor in the decision.

[37] In **Mitchell** v. **Mitchell**, [1982] BCJ No. 1628, the issue was whether the oral agreement, reduced to writing, settled all of the issues between the parties. The court held that the agreement merged with the judgment.

[38] At paragraph 13, the court concluded:

> 13. This written agreement, drawn by two able and experienced lawyers, made two months after the emotional day in court, is the best evidence the court have as to the circumstances and intentions of the parties when the oral agreement was made. The oral agreement made December 5, 1977 and recorded in writing on February 8, 1978, settled the issues between the parties. Judgment was pronounced and subsequently settled as to form and entered the decree nisi contained inter alia the following provisions:…

[39] One can see in reviewing these cases that the intention of the parties is critical to whether the doctrine of merger applies. As in **Mitchell**, the best evidence of the circumstances should be considered. In the case before me the best evidence of the circumstances and intentions of the parties is the CRJ, the Addendum to it, and as well the Separation agreement itself.

[40] The Applicant submitted a brief and numerous case authorities in support of its position, which is that the CRJ incorporates the Agreement generally and clause 28 specifically. It specifically incorporates section 28 by referring in section 2(b) to "all matters affecting the custody, care and control of the child".

[41] The CRJ refers generally to the Separation Agreement dated March 2, 2006 throughout - under the headings, Custody and Access, Child Support, and Property division - and specifically in paragraphs 2(a), 2(b), paragraph 6 and paragraph 9.

[42] Paragraph 9 of the CRJ states the Separation Agreement dated March 2, 2006 is "attached hereto and incorporated insofar as the jurisdiction of the Court allows".

[43] I concur with the Applicant, that there is no substantive difference and no disagreement between the provisions of the CRJ and the Agreement in regard to child support.

[44] Clause 28 itself states the obligation to maintain the life insurance continued for so long as child support was payable pursuant to the agreement "or any renewal, extension or substitution thereof by agreement or Court Order."

[45] In terms of whether the parties intended to incorporate the Agreement, I refer to clause 11 of the Agreement which states:

> 11. The within Agreement will constitute Minutes of Settlement of the Corollary matters in any subsequent Divorce proceeding and subject to the discretion of the Court**, will be incorporated in and form part of the CRJ in any subsequent proceeding** and will also constitute a Separation Agreement for all purposes including s. 23 of the *Matrimonial Property Act*, or any successor legislation. (Emphasis added)

[46] In the result, the parties clearly stated their intention at the time of signing the Agreement. They stated the Agreement would "be incorporated in and form part of the CRJ in any subsequent proceeding". This was stipulated by the parties under the heading, "the Nature of the Agreement".

[47] In both **Fitzpatrick** and **Mitchell** the courts reached their decision by applying common sense. In **Fitzpatrick** the court concluded, "The result is a sensible one". In **Mitchell** the court concluded, "And too, this conclusion accords with equity and good sense."

[48] In the case before me both parties came before me to argue the Application as if the CRJ incorporated the Separation Agreement as Minutes of Settlement. The critical aspects of the Agreement as to the corollary matters are essentially the same in both documents. The Agreement was referred to throughout the CRJ and was attached to it. The parties signed into the Agreement at the outset by stating in paragraph 11 it would be incorporated and form part of the subsequent divorce proceeding. The addendum dated March 27th, 2007 states in the opening recital, that the Agreement was entered into with respect to the dissolution of the marriage and to resolve the corollary matters outstanding between the parties.

[49] This in my view is a complete answer that the parties intended the Separation Agreement to be incorporated and form part of the CRJ. It also accords with common sense that if the Agreement was not to be incorporated, the parties would have said so and negotiated different terms. They did not. Instead, they accepted the Separation Agreement as part of the final Divorce judgment.

[50] I am therefore satisfied that clause 28 of the Separation Agreement is enforceable as part of the CRJ, and was incorporated therein.

Issue #2 Is the Applicant, Sharon Fralic entitled to an order directing payment to her in trust for her son Nicolas, remaining proceeds under the insurance policy held by her late husband, Marco Joseph Robert Drouin, who died on February 7, 2013?

[51] I have said that an underlying issue is whether there was agreement to change the beneficiary from solely Nicolas to Nicolas and Colleen Graham equally.

[52] I have reviewed the affidavit of the Applicant sworn October 18, 2013 and filed in support of this Application. In particular, I have reviewed paragraphs 27, 29 and 36 wherein she sets out the three changes made by her former husband . On each occasion, Ms. Fralic states at paragraphs 28, 30 and 37:

> I was not advised of this change in beneficiary designation at that time, and knew nothing of it. I did not consent to this change at that time or subsequently.

[53] According to her evidence Ms. Fralic did not know of any changes made until a conversation with Marco at the hockey rink on December 8, 2012. As she said in her affidavit, it became clear then he (Marco) was not honouring the Separation Agreement, stating at para. 33:

> His response left me no doubt that he had changed the beneficiary designation.

[54] It should be noted that she raised the subject with him, as she had learned in November of 2012, of his diagnosis.

[55] It was shortly after that that she retained a lawyer. I was satisfied on her evidence that she had mixed feelings, and was "torn", due to Mr. Drouin's ill health.

[56] She was determined however, to put Nicolas first. She made that clear. She advised Mr. Drouin on December 10th that she was enforcing the agreement. It was the next day, December 11, 2012 that he changed the beneficiary for Nicolas, back to Ms. Fralic. He did not however, change the policy to fully designate Nicolas as the sole, 100% beneficiary.

[57] The letter forwarded by her solicitor dated January 4, 2013 contained the following instruction from Ms. Fralic:

> Ms. Fralic has now received some indication from you that you have not maintained this coverage as agreed and ordered by the Court. She has been led to understand that you have named your present wife, Colleen Graham-Drouin , as beneficiary of a significant portion.

[58] I observed Ms. Fralic's demeanour in cross-examination and found she was sincere and forthright. She spoke of how hard it was to receive the news of "Marco". They had had a "great relationship" and kept nothing hidden. He was always trustworthy and of good character. She was confident he would not have made any changes without discussing it with her.

[59] There were references to previous discussions, contained in the text messages. These were attached to the Applicant's affidavit as Exhibits "H" and "J". The conversations by text occurred on December 10,2012 and January 8, 2013 respectively.

[60] On December 10th, Ms. Fralic says:

> …oh I thought you changed it when you married Colleen. It would have always been me.

[61] Later on January 8, Marco says:

> When it became serious with Colleen, it was only natural that my life insurance would be split between both… its only logical and we talked about it when I made the changes.

[62] In addition, Ms. Fralic was challenged on cross-examination about a phone call from Mr. Drouin on January 4, 2013 during a meeting he had with his insurance advisor, Ms. Fitzmorris, when making arrangements for the "Universal Policy" for Nicolas.

[63] Ms. Fitzmorris gave evidence that Mr. Drouin phoned Ms. Fralic on his cell phone, and that the call was lengthy. She said he needed Nicolas' original birth certificate information , Social Insurance No. and Passport No. for the meeting. Ms. Fitzmorris said she could not hear what was said, but that she (Ms. Fralic) seemed upset.

[64] Ms. Fralic was asked if she received the call. She said "no, he texted me". She was asked if she was sure? Her reply was "absolutely". She was asked if she was upset when she learned of the arrangement. She replied, "no". She was asked

if she agreed with the policy. She said she wasn't particularly happy about it, but her biggest concern was ensuring that the policy was set up with "pure intentions".

[65] In this regard, I infer she was expressing concerns about the Respondent's affidavit, that of Ms. Graham. There appears to be a clear contradiction, as to whether the phone call took place. Ms. Fitzmorris, not being a party, is an objective observer. She is more of an independent witness.

[66] I must consider this in assessing Ms. Fralic's credibility as well as the evidence as a whole.

Evidence of the Respondents

[67] Turning to the Respondents' evidence, Ms. Graham's counsel stated she relies upon two aspects of the evidence in particular: 1) the affidavit evidence of Ms. Graham, which she admitted was hearsay, as Mr. Drouin is deceased; and 2) the text messages exchanged between him and Ms. Fralic.

[68] Ms. Graham states in her affidavit, at paragraph 25 that Ms. Fralic agreed that 50% of the policy would go to Nicolas with her father as trustee and the other 50% would go to Ms. Graham. It was Ms. Fralic who provided her father's address for the September 23, 2011 amendment.

[69] According to Ms. Graham, the reason for this change was because he did not trust Ms. Fralic, and she said that he told Ms. Fralic this. He also told her (Ms. Fralic) that he wanted to leave Ms. Graham a portion of the policy.

[70] Ms. Graham in paragraph 27 of her affidavit refers to the text messages, stating Ms. Fralic agreed in December, 2012 to the change, as long as she was trustee instead of her father.

[71] In paragraph 26 Ms. Graham states she was unaware of the change made on June 8, 2012 and could provide no comment. I note that this was that designation which made her the trustee for Nicolas, replacing Ms.Fralic's father who had been appointed in September of 2011.

[72] In her oral testimony Ms. Graham was asked if she was surprised when the letter from Ms. Fralic's lawyer was received in January, 2013**.** She answered that "yes", it was a surprise.

[73] As part of her reason was, Ms. Graham stated she was "aware" that Marco changed the policy. I note that paragraph 24 of her affidavit states that she and Mr. Drouin discussed the policy in anticipation of their marriage and the necessity for it to be changed. This statement causes me to pause to consider the context of the changes, the first of which occurred two months after their marriage.

[74] This was the significant change, in that it divided the policy equally between Nicolas and Ms. Graham. This was not only the first change, but one would expect it would have been the major hurdle for Ms. Fralic, if indeed she did agree, as alleged.

[75] In paragraph 25, Ms. Graham speaks of that first agreement. She states that "Marco made them" but instead of the agreed 50-50, he designated 42% - 58% in favour of Nicolas, "to ensure Nicolas would get 50% of the face amount of the policy which was $200,000.".

[76] Ms. Graham now states, she would hold the funds of $147,000. in trust for Nicolas and "that she agreed with the deceased (Mr. Drouin) that these funds would be held in trust for Nicolas". Upon my reading of her affidavit, this was not made clear by Ms. Graham . It refers to the alleged agreement between Ms. Fralic and Mr. Drouin, but it does not mention any agreement between Ms. Graham and Mr. Drouin.

[77] I acknowledge that Ms. Graham's position to hold these funds in trust for Nicolas is a positive thing. It means in large measure, that the issue to be decided is not whether Nicolas will receive the funds, but who will manage them as trustee.

[78] In my view, much depends on whether there was in fact the agreement between the Applicant and Mr. Drouin, that these changes would be made. That is whether Nicolas' parents, came to a meeting of the minds.

[79] I have considered the affidavit evidence, the evidence given in cross-examination, re-direct and in rebuttal. I have considered the written and oral submissions made by both counsel.

[80] Having considered the matter carefully, I find Ms. Graham's evidence to be inconsistent, inaccurate and incomplete. My reasons are as follows:

i. She states that Ms. Drouin was intending to formally amend the CRJ but she had to be aware from the text messages that it would be anything but a formality.

ii. She pointed to the text messages as evidencing the agreement, but a review of those messages would suggest there was anything but an agreement.

iii. She states the change made by Mr. Drouin, that being 42% and 58% were made at the time of the first agreement agreed change in 2011, when in fact, that was the last change that occurred on December 11th, 2012.

iv. When asked why she was surprised when the letter from Ms. Drouin's lawyer was received, she did not say, it was because they had already agreed. Instead she said, " if it was a huge problem, I just didn't think you could go and change your policy". Ms. Graham appears to assume there was an agreement.

v. For his part Mr. Drouin did not say in the text messages there was in fact an agreement. Discussing the matter does not mean there was agreement.

vi. Ms. Fralic says there was not an agreement. Other than the designations which were unilaterally made by Mr. Drouin, there is no written evidence of one.

[81] Mr. Drouin allegedly did not trust Ms. Fralic, but yet his last act on the policy was to appoint her as the Trustee for his son, for the amount Ms. Graham said he wished to ensure that Nicolas received.

[82] The Applicant's counsel states it is inconceivable that Ms. Fralic would agree to make one-half of $400,000. payable to Graham, instead of 100% for her son.

[83] I concur it is unlikely that Ms. Fralic would agree to such a change, as it is to her son's detriment.

[84] Without a plausible reason being reason be offered, it makes no sense. Mr. Drouin's in his text message stated it was because he was now married to Colleen. It hardly seems that that would be sufficient for Ms. Fralic to agree.

[85] The issue however, is whether in fact she agreed.

[86] I have considered that her evidence was at odds with Ms. Fitzmorris about the cell phone call. Nonetheless I have have found Ms. Fralic's evidence in totality to be consistent and certain in regard to her intentions. Her father, Graham Fralic denied, by affidavit, ever being asked to serve or act as beneficiary or trustee. He stated he did not ever provide his address in Bridgewater, N.S. to Mr. Drouin. His address was publically listed.

[87] Mr. Fralic was not cross examined on his affidavit by the Respondent as to these alternate arrangements referred to in Ground #4 of the Notice of Contest.

[88] Further, the Respondent in Ground # 3 of her Notice of Contest, stated that Mr. Drouin had acquired additional dependants subsequent to the issuance of the CRJ. The Respondents have "backed off" on this ground as well, in the presentation of their case.

[89] At this point, it is important to mention an aspect of the evidence, which I found to be telling. One week before Mr. Drouin's unfortunate death, the World Financial Group file (entered as Exhibit #2) showed the following entry:

> January 30/13 – Marco signed paperwork to change beneficiary of T10 to Colleen as SISIP $400,000.00 will go to Nicolas with mother as trustee.

[90] Because Mr. Drouin is deceased, his evidence is hearsay. Section 45 of the *Evidence Act* of NS is applicable. It states that in these types of matters, that a statement or act of the deceased is to be corroborated by other material evidence. That other evidence exists in Exhibit #4,which confirms that the beneficiary change referred to in Exhibit #2, being the January 30, 2013 file entry above, was made. This in my view, corroborates both the change to that policy and the reason it was made. In addition, the entry in Exhibit #2 was made by an independent third party. Mr. Drouin was well aware of his condition and that it was imminent.

[91] No further change however was made to the SISIP policy.

Decision re: Agreement

[92] On the whole of the evidence, I am satisfied there was not an agreement between the parties that these changes to the SISIP policy would be made.

[93] The great respect given to the terms of negotiated agreements must be recognized, especially where they represent the intentions and expectations of the parties. (**Strecko** v. **Strecko**, 2014 NSCA 66).

[94] In this case the parties clearly intended and expected there would be $400,000. in life insurance for Nicolas. This provision is also in compliance with section 12 of the *Family and Children's Child Support Guidelines* as well as 15.1(4) of the *Divorce Act* allowing for the imposition of terms, conditions and restrictions on child support.

[95] Clause 28 is clear. It was to continue and remain unchanged for so long as Mr. Drouin had support obligations. Nicolas was eight years of age when the first change was made in 2011. The obligation was to continue long past that date. Mr. Drouin had always met his obligation.

[96] Ms. Fralic first inquired as to the status of the policy out of respect for Mr. Drouin and his wishes for Nicolas, shortly after she learned of his illness.

[97] Upon being informed that things were not as agreed with the policy, it was she who initiated the discussion. In text messaging, she informed him that she would be enforcing the agreement, in spite of sad circumstances, because she had to put their son's best interests first. She stated a number of times that she had no interest personally in the money.

[98] It was shortly thereafter that she retained counsel, which corroborated her statement that she would "fight" for Nicolas. It was before he received her counsel's letter of January 4, 2013, that Mr. Drouin made the change to put her back as the beneficiary for 50% of the policy designated for Nicolas, in trust for him.

[99] It was shortly after receiving the January 4, letter when Mr. Drouin made the change shown referred to in Exhibit 2, to the World Financial Group Policy. He did so knowing that Ms. Fralic "meant business" with respect to the SISIP policy.

[100] I am satisfied that Ms. Fralic has established there was no agreement on her part to change the beneficiary from Nicolas to Nicolas and Ms. Graham.

[101] The evidence suggests there was some discussion but it does not satisfy me there was an agreement.

[102] There being no agreement there must still be considered Ms. Graham's arguments that the test for constructive trusts cannot be met in these circumstances.

Constructive Trust

[103] I have said that a further underlying issue is whether the Applicant is entitled to a constructive trust

[104] The Respondents submit the Applicant cannot satisfy the three part test required in order for the Court to award her a constructive trust over the funds paid into court.

[105] The Respondents rely on the case of **Garland** v. **Consumers' Gas Co**, [2004] S.C.R. 629, in its submission as to the proper test. The principle argument of the Estate and Ms. Graham is that " the principle of unjust enrichment lies at the heart of constructive trust". They cite the well-known case of **Pettkus** v. **Becker**, [1980] 2 S.C.R. 834.

[106] In **Garland**, the requirements of a constructive trust were set out in paragraph 30 as follows:

1) An enrichment of the Defendant;

2) A corresponding deprivation of the Plaintiff;

3) An absence of a jurisdiction reason for the enrichment.

[107] I begin my analysis by affirming that where there is an enrichment, there must be corresponding deprivation. The Respondent argues there is no deprivation because the Applicant is not entitled to the funds, as they are designated for her son. Because she has no beneficial entitlement, she has suffered no deprivation.

[108] I shall first address the second part of the test, and whether the Applicant has been deprived. I shall return to discuss whether the Respondent has been enriched. (See paragraph 125).

2) Has the Applicant been deprived?

[109] Had the beneficiary designation not been changed by Mr. Drouin, the Applicant would have been the sole trustee for all of the funds to be held in trust for Nicolas, not merely 50% of the funds.

[110] On the facts before me, Ms. Fralic will lose the right to administer the entire funds and be sole trustee for her son. This is contrary to clause 28 of the CRJ, being the terms ordered by the Court to secure payment of child support.

[111] In my view, there is a deprivation to Ms. Fralic, in that the benefit of this term of the agreement, which she negotiated, is lost to her. The deprivation need not be strictly monetary, it can be a right which is lost or been diminished. Here, however, there is a monetary component to the right, one which allows Nicolas' mother, who is also his custodial parent, to manage these funds. This will impact him directly, and his future.

[112] I shall deal next with the third requirement of a constructive trust.

3) The requirement for Absence of a Juristic Reason

[113] The Respondents argue the third requirement of a consecutive trust cannot be satisfied because there exists a juristic reason for any enrichment and any corresponding deprivation. The Respondent argues however, there is neither an enrichment or deprivation.

[114] The Respondents rely on section 198 of the *Nova Scotia Insurance Act*, R.S.N.S. 1989, c. 231, which states:

> 198 (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse or common-law partner, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure.

[115] The Respondents argue that the designation is a "disposition in law and an operation of statute and fits squarely into the juristic reasons as articulated by the Supreme Court of Canada."

[116] Referring to **Garland** and other Ontario cases, the Respondents cite Halsbury's to suggest there is a valid reason in law, that being the *Insurance Act* , to deny recovery by the Applicant.

[117] The Respondent refers to the passage of Iacobucci, J in **Garland**, who in turn referred to the leading Canadian text on Restitution by Mc Camus and Maddaugh, once again referring to what is a "disposition of law".

> …it is perhaps self-evident that an enrichment will not be established in any case where enrichment of the Defendant at the Plaintiff's expense is required by law.

[118] I have considered the authorities provided by the Respondent. They rely further on Halsbury's in stating, "there must be no reason in law or justice that would justify the Defendant's retention of the benefit."

[119] I have read also and considered the case of **Kerr** v. **Barinov**, [2011] 1 S.C.R. 269, and the two step analysis for the absence of a juristic reason: 1) no reason in law for the benefit from an established category; 2) if none, the Plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[120] I have difficulty concluding that in these circumstances the designation under the *Insurance Act*, is a valid disposition in law. On its face this may be a reason from an established category, but the validity of the designation itself, is being called into question. Therefore whether the second part of the test above can be met is highly questionable. Indeed, it begs the question.

[121] Surely an unlawful designation, under the *Insurance Act* would not constitute a juristic reason, in circumstances where it has been found there was no agreement to change the beneficiary by designation. I have difficulty accepting an interpretation of s. 198, that would bar the claims of a creditors, when those creditors are the very persons for whom the policy was designated, in the first place.

[122] Moreover, I think the more appropriate question is that addressed in the analysis undertaken in **Richardson Estate** v. **Mew** (2008) 93 OR (3d) 537. At paragraph 57 the court concluded,

> … there are no circumstances that would cause me to conclude that the provisions of the *Insurance Act* should be overridden, based on unjust enrichment, to prevent an injustice in this case.

And later the court also concluded:

> I cannot say that the circumstances cry out for relief.

[123] In the circumstances before me, there is a strong argument that the provisions of the *Insurance Act* should be overridden to prevent an injustice. In short, that these circumstances "do cry out for relief".

[124] I am satisfied there is an absence of a juristic reason. Having found there was no agreement between the parties to change the terms of the CRJ; I find further that the provisions of the *Divorce Act*, and the expectation of the parties, in the negotiated agreement, must be given priority. Those expectations are paramount, in deciding whether there was a valid disposition in law. If the designation under the *Insurance Act* was unlawful, the provisions of the statute cannot be said to provide a juristic reason. I find that to be the case.

1) The Requirement for an Enrichment

[125] I now return to whether there was an enrichment of the Respondent under the first part of the test. One could make the argument that if the Applicant is deprived there must be an enrichment. The enrichment that would correspond to the deprivation in these circumstances would be any benefit to Ms. Graham of her being able to manage the funds for Nicolas. There is perhaps a benefit to her in that she will be honouring what she has described as her late husband's wishes. I do not find this to be an obvious benefit. It is arguable, but it is not as clear a benefit as is the deprivation to Ms. Fralic.

[126] The corresponding benefit to the Respondent could also be the benefit of having the funds managed by a trustworthy person, from the Respondents' perspective.

[127] I conclude, however, there is no clear benefit to the Respondents by simply being able to manage the funds as Trustee, for the funds paid into court. She is not Nicolas's mother nor his custodial parent. The funds advanced to Mr. Drouin under the policy, is a separate matter and will be dealt with under issues 3 and 4.

[128] I find therefore, that the first part of the three part test for constructive trust has not been met.

[129] That said, constructive trust itself may still be the applicable remedy. I have found simply that unjust enrichment fits squarely into this fact scenario. The real issue is not who is entitled to the funds, but who will manage them, as trustee.

[130] I therefore turn to discuss whether a constructive trust can still be granted.

Further Availability of Constructive Trust

[131] In this regard, I have found the court's discussion of constructive trust in **Soulos** v. **Korkontzilas**, 1997 CanLII 346, to be instructive. At paragraph 17, McLachlin, J., commented on the argument that constructive trust can only be imposed where the Plaintiff can demonstrate a deprivation and a corresponding enrichment of the Defendant. Writing for the majority she stated:

> The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the persons holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

[132] In **Snider** v. **Mallon**, 2011 ONSC 4522, the husband Mr. Snider failed to follow the terms of the Separation Agreement, and thus his common law spouse, and not his wife of 40 years was the one eligible to receive 50% of the remaining residual commissions owing to him. Similar to the case before me, the life assurance company held all payments pending the outcome of the lawsuit.

[133] At paragraph 13 of **Snider**, the court referred to the "well settled principle that an undertaking in a separation agreement creates a trust interest which will operate to protect the beneficiary should the undertaking party fail to honour his or her commitment".

[134] In **Fraser** v. **Fraser**, 1995 CanLII 1594 (BCSC), certain covenants in the separation agreement required the deceased to maintain his first wife as a beneficiary of his life insurance policies, so long as she was alive; and to keep the policies in full force and effect. Approximately one month prior to his death the deceased, made his second wife his beneficiary, of his group life insurance (which he converted to a personal plan) and death benefit available through his service with the Canadian Armed Forces.

[135] In **Fraser**, the court discussed the effect of the covenant to maintain the beneficiary in the separation agreement at paragraph 18:

> Under these circumstances, I am satisfied that the covenant to maintain the beneficiary in the separation agreement is **tantamount to an irrevocable designation of the beneficiary under the provisions of the *Insurance Act*.** In the case at bar, Margaret Fraser is in the position of a volunteer, having received the benefit of the policies which only occurs as a result of the deceased's breach of his covenant to the plaintiff. Under those circumstances, I am satisfied that the defendant Margaret Fraser holds the proceeds of the insurance policies as a constructive trustee in favour of the plaintiff. (emphasis added)

Decision re: Constructive Trust

[136] I am persuaded that these authorities are applicable in the case before me. The Applicant has pleaded her remedy on the basis of contract and the terms of the CRJ. The Applicant spoke in her evidence about "loyalty to the agreement", when the issue arose and when deciding she would enforce the provisions of the CRJ.

[137] In these circumstances, I concur that the best way for justice to be achieved, would be for the contract (the CRJ) to be honoured. This means that the successful party should be returned, to the extent possible to their position before the breach, as if the breach had not occurred. Simply put, as if the beneficiary designations under the policy not been changed.

[138] I find therefore, that the Applicant, Ms. Fralic is entitled to have the funds paid into court paid to her as beneficiary, in trust for her son, Nicolas. Clause 28 of the Separation Agreement created a trust interest which protected not only the beneficial owner of the funds, but the undertaking that Ms. Fralic would receive the funds in trust for Nicolas.

[139] There has been no renewal, extension, or substitution of the agreement nor was there any court order varying the terms and conditions of the Separation Agreement and in particular, clause 28.

[140] The Respondents put forth an argument of promissory estoppel, stating that Ms. Fralic should be estopped from reneging on the promise. I have found there was no agreement or promise, only discussion. I therefore reject this argument.

Issue #3 Is the Applicant, Sharon Fralic, entitled to an order directing payment by the Estate to her in trust for her son Nicolas, the $50,000. advanced to Mr. Drouin on the policy of life insurance prior to his death?

[141] The Applicant in Ground #9 of the Application claims an Order directing the Estate to pay to Fralic, in trust for Nicolas, the $50,000. advanced to Mr. Drouin on the policy, prior to his death. The affidavit of Ms. Pouliot confirms at paragraphs 10, 13 and 14 that a cheque for the advance was requested on December 7, 2012 and sent to Mr. Drouin on December 14, 2012. This left the amount under the SISIP policy at $350,000. and not $400,000..

[142] Ms. Fralic's claim against the Estate is grounded in contract and on the terms of the CRJ. The Respondent argues the advance on the SISIP policy was undertaken in part, on the basis that it would be used to obtain an alternative policy for Nicolas, which would provide him with additional security in future. The Respondent submits this was out of concern that the SISIP policy would be inadequate. Indeed, the Respondent, says she will be required to maintain and administer the plan, at a cost totalling $60,000. until Nicolas reaches the age of twenty- nine years. Ms. Graham says she will see no personal benefit from these funds.

[143] While this was "part" of the reason for the advance, the second affidavit of Ms. Graham shows that of the $50,000., the amount $3,901. was written for the Universal Life Fund established for Nicolas, prior to his father's death.

[144] Her affidavit evidence shows that the rest of the money was used to pay debts, to make gifts to relatives, and to pay funeral expenses. It is not entirely clear which funds were paid from the advance, as more than $50,000. was expended according to Ms. Graham's affidavit of January 14th,2014.

[145] Initially, the intention had been to take a family vacation. This was confirmed by Mr. Skelhorn in his evidence. Tragically, Mr. Drouin's illness progressed too quickly for that to happen.

[146] The matter of the Estate's liability in respect of the advance seems straightforward. This is because clause 28 is clear that Mr. Drouin's obligation was to carry "a minimum of $400,000.". Therefore, regardless of the reasons for the advance, the breach occurred upon Mr. Drouin receiving it, as it brought the amount below the minimum amount of $400,000. by $50,000.

[147] The only issue remaining in order to assess liability by the Estate is to determine that the requirement did not change, and to be satisfied that the provisions of the CRJ are binding on Mr. Drouin's heirs, successors, administrators and assigns, and thus his Estate.

[148] In her first affidavit Ms. Graham attached as Exhibit "A", what she described as a portion of the work Mr. Drouin was able to do, to prepare an application to vary the CRJ. I have already determined on the facts, that there was no agreement to change the policy.

[149] I note, however, that in Exhibit "A", Mr. Drouin stated the changes were made at the "end of 2007". This does not accord with the actual changes made to the policy which prior to 2011 were made in 2006, around the time the Separation Agreement was signed. At that time, Ms. Fralic and not her father was the Trustee for the minor child, Nicolas.

[150] In respect of the Separation Agreement being binding on the estate, clause 72 of the Agreement reads:

> 72. The terms of this agreement are binding on the respective heirs, executors, administrators and assigns of the Husband and the wife.

[151] Furthermore, and significantly, clause 73 of the agreement between the parties reads:

> 73. This Agreement will enure to the benefit, of and be binding upon, the parties, their heirs, executors, administrators and assigns and where either party is deceased and has failed to fulfil an obligation hereunder, and that failure results in a financial loss to the surviving party, the amount of such loss will be a first charge on the estate of the deceased party for the amount which the deceased party would have paid had such obligation been duly performed as contemplated by this Agreement.

[152] It is clear these matters had been contemplated by the parties and their counsel at the time of separation.

[153] The Applicant makes a succinct and compelling argument. That is, by Mr. Drouin failing to comply with the terms of the 2006 Separation Agreement and the CRJ, his Estate must make good on this failure, by paying to Ms. Fralic the necessary funds to bring the amount of the insurance proceeds, up to $400,000.

[154] This is the straightforward position advanced the Applicant. However in light of the Respondent's position, the Court should consider whether these circumstances warrant a strict application of contract law having regard to what was intended by Mr. Drouin, when he requested the advance.

[155] Mr. Drouin fell ill suddenly. I accept as a primary reason, that he wanted to take a family vacation. Ms. Fralic said herself, that he was a person of good character. It is clear he cherished is relationship with his son and that this was a central reason for the intended family vacation.

[156] Simple math would suggest that the Estate should be liable to the Applicant in trust for Nicolas for $50,000., less perhaps the $3901., paid for Nicolas's benefit, as the initial premium on the Universal Policy arranged for him by his father.

[157] I find, however, it would be short sighted to simply enter judgment against the estate for $50,000., or the lesser amount without considering the evidence that suggests that Mr. Drouin acted in good faith in taking steps toward preparing for Nicolas' future.

[158] The Applicant submits the evidence adduced, suggests that the Estate does not have sufficient funds to satisfy a judgment. Before deciding on what amount, if any, the Estate should be liable for to the Applicant, it is prudent to consider the claim which the Applicant makes against Ms. Graham for recovery of all or a portion of the advance.

Issue #4 Is the Applicant, Sharon Fralic, entitled to an order directing the Respondent Colleen Graham to pay all or a portion of the $50,000. advanced to her in trust for Nicolas?

[159] The claim by the Applicant against Ms. Graham personally is grounded in the equitable doctrine of unjust enrichment.

[160] The Applicant is asking the Court to impose a constructive trust over the monies wrongly paid to Ms. Graham for her benefit.

[161] It is not disputed that Mr. Drouin spent certain sums of this money prior to his death, and that the balance remained in a joint account between he and Ms. Graham.

[162] The second affidavit of Ms. Graham stated that the following sums were expended by Mr. Drouin:

1) January 14, 2013 - $20,884. on a credit card in his name;

2) January 21, 2013 - $4,338.66 – bank draft issued; no evidence as to its purpose.

3) January 21, 2013 - $3,901. – cheque to Universal Life Fund established for Nicolas by his father prior to his death.

[163] These sums total $29,123.66, leaving a balance of $20,876.34 from $50,000.

[164] Additional sums spent after Mr. Drouin's death were:

a) A payment of $10,000. each to Mr. Drouin's two brothers;

b) Funeral expenses for Mr. Drouin in Quebec of $7,914.;

c) Airfare and hotel costs for Mr. Drouin's family, excluding Ms. Fralic, of $5,000.

[165] Notably an outstanding car loan for which Ms. Graham and Mr. Drouin were jointly responsible was paid out on March 6, 2013, in the amount of $13,845..

[166] The Applicant submits that Ms. Graham should be responsible to repay the balance of $20,876.44 left in the account at the time of Mr. Droun's death . In addition she submits that the amount of $3,901. should be repaid as it is an asset to her as the owner and beneficiary. This would total of $24,777.44 or approximately $25,000., representing half of the advance. This is the amount that can be directly traced to her, argues the Applicant.

[167] The Respondent argues that the alternative policy (the Universal policy) will have a cash surrender value of at least $50,000. and will benefit Nicolas, thus replacing and accounting for the shortfall in the SISIP life insurance due to the advance. This Universal Policy/investment fund was taken out to provide a greater amount of support for his son. The Respondent has agreed to maintain this policy until Nicolas reaches the age of 29 years, at a cost of $60,000. As stated by her, she will see no personal benefit from that plan.

[168] The Respondent has further stated in evidence that she has maintained Nicolas' RESP and has added him to her family health and dental plan, available through the Department of National Defence.

[169] The amounts paid out as contained in Ms. Graham's affidavit exceed the amount of the advance, by approximately $20,000. It is therefore not a straightforward calculation as to which of these were paid from the advance monies.

[170] The Applicant acknowledges the remedy she seeks is an equitable one. In these circumstances it should be granted only if there is a clear enrichment, together with the other requirements for a constructive trust. There is clearly a deprivation because simply put, upon Mr. Drouin's death there would have been an extra $50,000. paid out, but for the advance.

[171] In terms of an enrichment to the Respondent Ms. Graham, the remedy should be considered only if it is clear there was an enrichment personally to her.

[172] Having the trip for the funeral in Quebec paid for was a benefit, monetarily, but it hardly seems just to consider it an enrichment. Similarly, the funeral expenses.

[173] The monies paid to his brothers did not enrich the Respondent. She stated it was Marco's wish. However, it was her wrote these two cheques.

[174] In the case of **Schorlemer**, there is authority for re-allocating funds in trust from life insurance proceeds to other dependents. There is no evidence before that Mr. Drouin's brothers were dependents.

[175] The one clear payment which did benefit Ms. Graham was payment of the car loan. This was a joint loan which became her liability upon Mr. Drouin's passing.

[176] On the one hand it was their joint responsibility prior to his death. On the other hand the funds in their joint account became hers upon his death, subject to the trust upon those funds being requested herein by the Applicant .

[177] There is in my view, justification that the $13,845. paid for the car loan, constituted an enrichment to the Respondent, Ms. Graham. It can be considered a deprivation to the Applicant, as the funds would otherwise have been payable to the Applicant in trust for her son. There is no juristic reason for having the loan

paid. In arriving at this conclusion, I have considered the equities of the situation, including those I have mentioned.

[178] With respect to the premium of $3,901. that was a decision of Mr. Drouin, made primarily to benefit his son and not the Respondent Ms. Graham. At the time she was the contingent owner and is now the owner. She is the only beneficiary and now Nicolas is the contingent owner, according to the evidence of Ms. Fitzmorris.

[179] With regard to the future payment of $60,000. it should be mentioned that Nicolas was originally the beneficiary of a civilian life insurance (through World Financial Group) policy in the amount of $250,000. The total was one million. The beneficiary was changed to Colleen Graham and the Respondent has acknowledged that she has received both amounts. (See Exhibit #4- Equitable Life Policy #300040352).

[180] I recognize there is not legal obligation for the payments in the Universal policy to be made on Nicolas's behalf, but the Respondent has stated under oath and by way of affidavit that she will continue to pay the premium amounts for that purpose.

[181] In Paragraph 7 of her January 20, 2014 affidavit she states she personally committed to Mr. Drouin, that she would continue to make the annual payments on Nicolas' Universal Life fund. Her first affidavit dealt extensively with this fund at paragraphs 30, 31, 32, and 33. She states that after numerous discussions with Ms. Fitzmorris and herself, Mr. Drouin thought this fund was the best long term planning for Nicolas, that was possible in the circumstances.

[182] The difficulty is that there is nothing mandating it be given to Nicolas in the future. It is clear, however, that Mr. Drouin set it up for that purpose and was comfortable with it as was Ms. Fitzmorris and as is Ms. Graham.

Decision re: Ms. Graham's Liability

[183] Taking all of these factors into account, I find that the Applicant is entitled to an order requiring Ms. Graham to pay the amount of $13,845. to Ms. Fralic in trust for Nicolas.

[184] The claim by the Applicant against Ms. Graham is based on what money can be traced into her hands. At the time of Mr. Drouin's death the amount in the joint

account left to her was $20,876.34. I have considered whether to grant an order requiring her to pay this or a lesser amount amount to the Applicant. I have decided against such an order for the reasons set out below. (see paragraphs 192 and 195.)

The Estate's Liability

[185] Returning to the order sought against the Estate, it must be considered that the amount of insurance was in place as security for payment of child support, for as long as it was payable. It was not a commitment to pay that sum ($400,000.), but to maintain the insurance. I note that Mr. Drouin continued to pay the child care component of the support payment of $700. even after the requirement for child care had passed.

[186] I think it would be improper to duplicate an amount payable by the Estate and Ms. Graham, unless there is a reason for joint liability. There must be a valid reason for her to pay, and not simply because the Estate cannot. Nor, do I think there is anything to be gained by saddling the Estate with an onerous burden in these circumstances, unless it is equitable.

[187] I return to the fact that a lot happened very fast for Mr. Drouin. Decisions were required to be made quickly. He was not entitled (due to his contractual obligation) to reduce the amount of insurance available, but he was also not obligated to make the other arrangements he did for his son, Nicolas.

[188] A fair and just decision requires the Court to consider the available alternatives to ensure that Nicolas can receive what he is entitled to receive under the Separation Agreement and the CRJ.

[189] As part of her submission counsel for the Respondents submitted that Ms. Graham "…has committed herself financially to those payment schedules for Nick's Universal Life Insurance fund which amounts to approximately $60,000.".

[190] At paragraph 7 of her second affidavit Ms. Graham states:

> During the time Marco (and myself) were making these financial decisions, I personally committed to Marco that I would continue to make the annual payments on Nicolas' Universal Life Fund which amount to total payments over $60,000.00 until Nicolas turns 29, at which time the payments cease.

[191] The Court has heard evidence from Ms. Fitzmorris, that this policy will provide Nicolas with considerable funds for his future. Monetarily she stated it the amount would be approaching one million dollars, in terms of cash value, contingent upon the annual premiums being made.

[192] I have therefore decided that in *lieu* of a judgment against the Estate for $50,000. or other sum, the best way to achieve an equitable outcome is to formalize the commitment made by Ms. Graham that the annual premiums on the Universal Life Insurance policy will be made in full by her, for Nicolas' benefit.

[193] I have pointed out that the obligation under the Separation Agreement is binding on the heirs, successors, administrators and assigns of the respective parties. "Heirs" means, Mr. Drouin's lawful heirs. We have heard evidence from Ms. Graham that the Estate has not been probated.

[194] With the Estate not being opened and potentially insolvent, a judgment against the Estate, will not provide Nicolas with the security intended by the Agreement.

Decision re: Estate's Liability

[195] I therefore direct that in *lieu* of any Judgment against the Estate, I shall order the Respondent Ms. Graham, to make the required payments for the premiums under the aforesaid Universal Fund policy, as she has represented to this Court, she would do until Nicolas reaches the age of 29 years.

[196] In so doing, Nicolas will be restored to the position of having received the full amount of life insurance under clause 28 of the Agreement. While Nicolas will to some extent lose the benefit of interest on a lump sum if paid now, I am satisfied the amount recovered in the long term will compensate him.

[197] Ms. Graham has under oath undertaken to do what will in effect, the Estate is otherwise obligated to do in regard to the monies advanced. Such an Order will also be in keeping with his father's intent, as we have heard in evidence from both the Respondent and his insurance advisor.

Conclusion

[198] The amount paid into court from the SISIP policy of $147,355.75 will be paid to the Applicant, Ms. Fralic, in trust for her son, Nicolas Drouin.

[199] The Respondent, Colleen Graham, shall be responsible to repay the car loan in the amount of $13,845. to Ms. Fralic in trust for her son, Nicolas Drouin.

[200] In *lieu* of any further judgment or amounts payable by the Estate and/or the Respondent, Ms. Graham, Ms. Graham shall formalize her agreement to make the necessary payments on the Universal Policy taken out by Mr. Drouin for his son Nicolas, which payments are summarized in paragraph 7 of Ms. Graham's affidavit of January 20, 2014.

[201] I will hear the parties with respect to costs in this matter.

Murray, J