Equitable Receivers and Beneficiary Designations: Recent Developments

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Introduction

The courts have been increasingly called upon to answer questions related to the splitting of pensions upon marital breakdown. This paper will focus on two recent issues recently considered by the courts. First, the attempt to bypass the limits put in place by the *Pension Benefits Act*[1] (the "PBA") and similar legislation through the appointment of equitable receivers. Second, the role of separation agreements in the revocation of a previous beneficiary designation in favour of the former spouse. This paper will discuss the current status of the law regarding these issues.

Equitable Receivers: The Legislative Framework

The use of equitable receivers arises in the context of the PBA limits, which prevent a member spouse from transferring the full value of his accrued benefit to his or her former spouse. Sections 65 and 66 of the PBA generally prohibit the assignment, giving as security, surrender, execution or seizure etc. of money payable under a pension plan.

Accordingly, the PBA restricts the ability to seize pension benefits for the purpose of enforcing judgements. However, there is an exemption in section 65 for assignments "of an interest in money payable under a pension plan … by an order under the *Family Law Act* or by a domestic contract as defined in Part IV of that Act." This exception is limited under section 51(2) to 50% of the pension benefits accrued during the marriage (calculated in the prescribed manner).

There is also an exception in section 66(4) for the enforcement of support orders:

> Despite subsection (1), payments under a pension or that result from a purchase or transfer under section 42 or 43, clause 48 (1) (b) or subsection 73 (2) are subject to execution, seizure or attachment in

[1] R.S.O. 1990, c.P.8

satisfaction of an order for support enforceable in Ontario to a maximum of one-half the money payable.

Leading Cases on the Use of Equitable Receivers

One way in which former spouses have attempted to gain access to more than 50% of the member spouse's pension asset or, often, to attempt to correct deficiencies in the original settlement or order, is via the concept of equitable receivership. The Ontario Court of Appeal has recently heard several cases related to the appointment of equitable receivers to obtain a share of pension benefits.

Hooper v. Hooper[2] is the leading case in Ontario regarding the appointment of an equitable receiver to collect a former spouse's pension benefits. The husband failed to make the required equalization instalments and inform his former wife when he received a severance package upon early retirement. The wife applied to become an equitable receiver of his pension benefits with 50% to be applied to the support order and 50% applied to the equalization order. The motions judge allowed the wife's application and the husband appealed.

The Court of Appeal noted that the PBA seeks to avoid a pensioner being deprived of the retirement income that the pension plan was intended to secure. In particular, the Court of Appeal held that the PBA's exemptions do not apply to permit any order under the *Family Law Act* to be executed against a member's pension benefit but, rather, only support orders or equalization orders that operate to give a specific interest to the former spouse. The Court of Appeal concluded that the equalization order, which did not divide the member's pension or order the equalization payment as owing against the pension, could not be fulfilled through the use of an equitable receiver. Regarding the appointment of the wife as an equitable receiver to collect the pension benefits for the support obligations, the Court of Appeal found that this was unnecessary as the benefits were being diverted by the plan at the source to the Family Responsibility Office based on the support order. However, she was free to reapply should the diversion fail to satisfy the support obligation.

Most recently, the Court of Appeal addressed the matter of equitable receivers in *Workers' Compensation Board v. Lettroy*.[3] This case does not directly address the issue in the context of marriage breakdown. However, it affirms the leading cases regarding the use of equitable receivers. Lettroy was convicted of fraud in connection with the unlawful issuance of over $1.1 million in cheques from his employer, the Workers' Compensation Board (the Board), and was terminated from his employment as a result. The Board subsequently obtained a civil judgment against Lettroy for the full sum of the unlawful cheques. When the Board realized

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[2] (2002), 59 O.R. (3d) 787 (C.A.) [hereinafter *Hooper*].

[3] (2006), 81 O.R. (3d) 401 (C.A.) [hereinafter *Lettroy*].

that Lettroy's only asset was his pension fund, it also obtained an order appointing a private equitable receiver to collect the funds from the Board's pension plan and pay those to the Board in satisfaction of the civil judgment. Lettroy passed away before commencing his pension and the Board applied to the court to amend the order to allow for the collection of Lettroy's death benefits payable from the pension plan. Lettroy's designated beneficiaries intervened in the proceedings, claiming entitlement to the death benefits. A motions judge, relying on s. 101 of the *Courts of Justice Act*,[4] allowed the Board's amendment. The designated beneficiaries appealed from that decision.

The Court of Appeal found that the motions judge erred in the appointment of an equitable receiver to collect Lettroy's pension benefits. In particular, the Court of Appeal found that this was in direct contradiction with s. 66(1) of the PBA. The Court of Appeal noted that the legislature was clear when it prohibited the execution, seizure or attachment of pension benefits to satisfy a judgment. The legislature was equally clear when it created a single exception for the enforcement of support orders, to a maximum of 50% of the pension benefits available. The Court of Appeal noted that previous cases clearly stated that equitable remedies cannot undermine the PBA. In particular, the Court of Appeal affirmed its own decision in *Hooper* and the Ontario General Division's decision in *Beattie v. Ladouceur*.[5] Lettroy's pension benefits were protected by the PBA and an equitable receiver could not be used to skirt the statutory protections in place. The Court of Appeal concluded by noting that the pension plan dictated the distribution of death benefits, and the courts could not meddle with the scheme that was in place. Finally, it is important to note that the designated beneficiaries had an interest in the pension benefits, unlike beneficiaries found under a will. On all these points, the Court of Appeal allowed the appeal and ordered that the death benefits be paid out to the designated beneficiaries.

The other leading decision affirmed by the Court of Appeal in *Lettroy* is the 1995 decision in *Beattie*. The decision was not decided under the PBA, but under the federal minimum standards pension legislation[6], which contains a similar restriction exempting pension benefits from attachment, seizure and execution, "either at law or equity". The court stressed that the order being appealed, which appointed an equitable receiver to collect all of the former husband's pension benefits, exceeded the clear statutory framework provided by Parliament. In particular, the court emphasized that equity creates remedies to achieve justice when the common law's rigidity will not allow a remedy. Here, the statute provides clear recourse and the

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[4] R.S.O. 1990, c.C.43

[5] (1995), 23 O.R. (3d) 225 (Div. Ct.) [hereinafter *Beattie*].

[6] *Pension Benefits Standards Act*, 1985, R.S.C. 1985. c. 32 (2nd Supp.) (the "PBSA")

courts must follow and apply the statutory remedies, complete with their restrictions.

Shortly before the Court of Appeal decided the *Lettroy* decision, it rendered a decision in *Trick v. Trick*.[7] This case involved an appeal from an order granting full vesting of the former husband's pension in the recipient wife to enforce a support order. The Court of Appeal reviewed section 66(1) of the PBA and found that the motion granting full vesting could not stand. As part of the wife's case, she argued that she was not seeking execution at law, but in equity, and therefore the PBA did not restrict her ability to obtain the full vesting. The Court of Appeal likened this argument to an argument in favour of the appointment of an equitable receiver. As a result, the Court of Appeal rejected this argument, finding that an equitable remedy could not be used if it would run directly counter to a prescribed legislative scheme. The Court of Appeal found that this was not a case of equity being invoked to overcome the limitations of the common law, as there was no impediment to preclude garnishment to satisfy the orders. Therefore, an equitable order vesting a former spouse in the member's pension also contravenes the PBA.

The decision in *Trick* was recently relied upon by the Ontario Superior Court of Justice in *Malerba v. Malerba*[8] to dismiss a former wife's motion to transfer 100% of her former husband's pension into her own RRSP in satisfaction of outstanding support payments. The husband's pension was regulated by the federal PBSA. The Court noted that the federal PBSA creates an exception to the general prohibition against assignment, etc., for property division, but differs from section 66 of the PBA, which makes express reference to the enforcement of support orders. The Court found that, although the federal PBSA contemplates voluntary assignment by the plan member, the Court can not force a plan member to make such an assignment, as it would conflict with section 18 of the statute. Concurring with the reasoning in *Trick*, the Court found that permitting the vesting of the former husband's pension in the manner sought would run counter to the prescribed legislative scheme.

Distinguished Cases: No Conflict With the PBA

In *Lettroy* and *Hooper*, the Court of Appeal distinguished two cases used in support of the appointment of an equitable receiver. First, *Nicholas v. Nicholas*[9] involved a case in which the former wife was granted an equalization order for 50% of the former husband's pension benefits to be paid directly from the plan in accordance with section 51 of the PBA, which discusses the enforcement of separation agreements or court orders for up to 50% of the value accrued while the parties were

[7] (2006), 83 O.R. (3d) 55 (C.A.). [hereinafter *Trick*].

[8] (2007), 38 R.F.L. (6th) 426 (Ont. S.C.J.) [hereinafter Malerba].

[9] (1998), 17 C.C.P.B. 130 (Ont. Gen. Div.) [hereinafter *Nicholas*].

spouses. The wife was also appointed the equitable receiver of the balance to satisfy the support obligation. The appointment of the wife as the equitable receiver in relation to the support obligation did not violate any provision of the PBA, as she was only receiving 50% of the pension benefits for the support order as permitted by section 66(4). The Court of Appeal noted that neither part of the order was in direct conflict with the applicable legislation, and therefore the case was distinguishable from circumstances in which an equitable receiver is appointed in a manner conflicting with the protections of section 66(1).

The other case that was distinguished by the Court of Appeal was *Simon v. Simon*.[10] This case is often cited in support of the appointment of an equitable receiver to obtain the entirety of a pension benefit. The Court of Appeal noted that this case was decided before amendments were made to the PBA to limit execution based on support orders to 50% of the member's pension. As a result, this case can no longer be used in support of an appointment for the collection of the full amount in light of section 66(4) of the PBA.

Using Equitable Receivers: Issues to be Aware of

The law in Ontario is clear that the appointment of a former spouse as an equitable receiver as a means of accessing the member's pension monies is generally not a remedy that will be granted. However, such an order will not necessarily conflict with the PBA as long as:

* it is solely for the enforcement of a support order.

* the order does not exceed 50% of the pension benefits available.

However, as the Court of Appeal pointed out in *Hooper*, the appointment of an equitable receiver is not necessary when support payments are being diverted at the source. In those circumstances, an application for the appointment of an equitable receiver should not be made unless the diversion is no longer satisfying the support obligation.

Another important issue is whether an equitable receiver can be used to obtain 50% of the pension benefits (for support) where an equalization order for 50% has already been made. This issue is also referred to as stacking. In *Nicholas,* and more recently in *Gauthier v. Gauthier,*[11] the courts have readily allowed the stacking of the orders, effectively transferring the entire value of the pension benefit to the former spouse. In both decisions, the courts noted that the PBA does not expressly prohibit

[10] (1984), 45 O.R. (2d) 534 (Div. Ct.).

[11] (2003), 55 C.C.P.B. 156 (Ont. S.C.J.).

stacking and simply ordered 50% in satisfaction of the equalization payment and 50% in satisfaction of the support obligation.

Finally, the recent decision of *Loblaw v. Loblaw*[12] raises another issue related to the appointment of an equitable receiver. The former wife sought an order transferring the husband's full pension benefits to her and, in the alternative, to be appointed the equitable receiver of the husband's plan. However, the husband was only 59 years old and not yet receiving his full pension. If the wife were to succeed, the order would effectively force the husband to choose to receive a reduced pension, for which he was eligible at the time. The court noted that section 51(1) of the PBA states that an order is not effective before the earlier of the date payment of the pension begins and the member's normal retirement date. The court acknowledged that *Hooper* is the leading decision regarding the appointment of equitable receivers to obtain a former spouse's pension benefits. However, the court also observed that the benefits at issue in *Hooper* were "in pay". The court refused the wife's motion, on the basis that the order would create a new trigger under section 51(1) of the PBA, which was beyond the court's powers.

Revoking Beneficiary Designations: The Legislative Framework

Whether separation agreements revoke beneficiary designations under pension plans and benefit plans is another issue often raised by parties. The legislation governing this area varies depending on the benefit for which entitlement is being sought. The PBA is not the central statute regulating these matters. Instead, the *Insurance Act*[13] and the *Succession Law Reform Act*[14] (the "SLRA") are the most pertinent statutes regarding the revocation of a beneficiary designation. In particular, the *Insurance Act* requires that the designation or revocation of a beneficiary be accomplished through a declaration. Section 171 of the statute defines a declaration as follows:

> "declaration" means an instrument signed by the insured,
> (a) with respect to which an endorsement is made on the policy,
> (b) that identifies the contract, or
> (c) that describes the insurance or insurance fund or a part thereof,
> in which the insured designates, or alters or revokes the designation of, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable;

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[12] (2005), 46 C.C.P.B. 196 (Ont. S.C.J.).

[13] R.S.O. 1990, c.I.8

[14] R.S.O. 1990, c.S.26

Obviously, the *Insurance Act* governs the beneficiary designation under all insurance related benefits, such as life insurance or RRSPs established via an insurance policy.

The SLRA governs the revocation of beneficiary designations for most pension plans, and trusteed RRSPs. Section 51(1) of the SLRA provides as follows:

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

"Plan" is defined to include pension plans. On a plain reading of the statutory provisions, separation agreements can be used to revoke beneficiary designations so long as all legislated requirements are met.

Recent Cases Discussing Revocation of Beneficiary Designations

The most recent decision regarding the revocation of a beneficiary designation through a separation agreement is *Conway v. Conway Estate*.[15] In this case, the deceased's former spouse sought a declaration that she was entitled to receive the proceeds of a group life insurance policy and the pension plan death benefits under which she was designated as beneficiary during the course of the marriage. The deceased's estate contested the application on the grounds that the parties had entered into a written separation agreement, in which the former wife gave a general release of her interest and claims, including in the former husband's estate. The estate also argued that it would be unjust to award the former wife the survivor benefits as the value of the pension benefits was included in the calculation for the equalization payment.

First, the court first considered the beneficiary designation of the group life insurance policy. Noting the requirements for a declaration under the *Insurance Act*, the court found that the separation agreement did not satisfy the statutory definition of a declaration. Specifically, the releases failed in the following areas:

* The releases did not identify the contract of insurance;
* The releases did not describe the insurance at all, and;
* There was no endorsement made on the policy as a result of the agreement.

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[15] (2006), 25 R.F.L. (6th) 106 (Ont. S.C.J.) [hereinafter *Conway*].

Accordingly, the former wife continued to be the designated beneficiary of the group life insurance plan.

The estate attempted to argue that the deceased had intended to change the beneficiary designation. The court rejected this argument, stating that his intention was irrelevant in determining whether the applicant was entitled to the benefits. At the very least, his failure to change the designation was not proof of a clear intention to revoke the designation.

The court then considered the beneficiary designation for the pension plan survivor benefits. The estate contended that the process for the revocation of the designation of a beneficiary under the SLRA is less formal than the process under the *Insurance Act*. The court was not persuaded by the estate's argument. Instead, the court emphasized that the separation agreement did not revoke the beneficiary designation because there was no specific reference to the pension plan in question. However, the court acknowledged that the pension plan was included in the calculation of the equalization payment. Using the doctrine of unjust enrichment, the court found that the deceased would not have intended his former spouse to also receive the survivor benefits having equalized the value of his pension. As a result, the court imposed a constructive trust in favour of Mr. Conway's estate in respect of the benefit payable under the pension plan. The former wife was only awarded entitlement to the group life benefit.

Another recent decision, which was considered in *Conway*, is *Gaudio Estate v. Gaudio*.[16] This was an application by the estate for an order that the deceased's former wife was not entitled to the benefits of the deceased's RRSP and life insurance policies. During the marriage, the wife had been designated as the beneficiary of the deceased's benefit plans. When the couple separated they entered into a separation agreement in which the wife contracted out of her entitlement to share in the deceased's estate. The court found that the covenants in the separation agreement did not revoke the beneficiary designation to the proceeds of the insurance policy or the RRSPs. The separation agreement did not contain any specific language revoking the designation; instead, the agreement only contained boilerplate clauses that were inoperative as revocations of the designated beneficiary under the respective benefit plans. Further, the court found that there was no evidence that the deceased intended to change the designated beneficiary and that the deceased's intention was nevertheless irrelevant to the question of whether there was in fact a valid revocation. Finally, the court also found that because the separation agreement was drafted at the behest of the deceased, the *contra proferentem* rule applied where any ambiguity existed and held that the meaning least favourable to the maker of the document should prevail. The court also found that no form of trust or unjust enrichment applied to the case at hand.

[16] (2005), 16 R.F.L. (6th) 72 (Ont. S.C.J.) [hereinafter *Gaudio*].

The *Conway* decision also distinguished *Urquhart Estate v. Urquhart*[17], which was relied upon by the deceased's estate to argue that the designation was revoked. The *Urquhart* case did not involve the use of a separation agreement to revoke a designation upon marital breakdown. Instead, the court was called upon to determine whether a line in the deceased's will altered the beneficiary designation of her insurance policy. As the term in the will specifically referenced the policy, the court found that the requirements of the *Insurance Act* were met, and held that the designation was revoked.

Leading Principles on Revocation: Burgess v. Burgess Estate

A clear example of a case in which a separation agreement was successfully used to revoke a beneficiary designation is *Burgess v. Burgess Estate*.[18] In this case, the Ontario Court of Appeal reviewed a decision awarding the entire value of the deceased's deferred profit sharing plan ("DPSP") to the former spouse. The former wife was the designated beneficiary of the deceased's interest in the DPSP. However, when the parties separated they entered into an agreement in which they agreed to settle all issues between them. The separation agreement specified that the parties mutually released all entitlements to each other's benefit plans, with the exception that the wife was entitled to one-half of the benefits of the DPSP. The deceased never notified his employer of the provision in the separation agreement, nor did he send any revocation of the original beneficiary designation.

After the husband died, the wife asserted a claim for one-half of the benefits of the DPSP. However, after learning of the deceased's failure to actually change the designation, she amended her claim for the entire benefit. The court of first instance allowed the application, and awarded the wife the entire amount of the benefit. The court found that the failure of the deceased to change the designation evidenced an intention for the wife to have the voluntary additional benefit of the entire proceeds.

On appeal, the Court of Appeal found that the trial judge erred in her conclusion. First, the Court of Appeal reviewed the relevant provisions of the SLRA, finding that the DPSP was a plan under the statute and the separation agreement was an instrument. The Court of Appeal distinguished much of the jurisprudence in favour of the wife's position on the basis that none of the previous cases involved a separation agreement with the degree of specificity found in the agreement between the parties in this case. Further, the Court of Appeal found that the original beneficiary designation was not expressed to be irrevocable. In fact, the Court of Appeal noted that the wording of the designation contemplated that it could be revoked. The Court of Appeal found that the SLRA does not require that a revocation of a prior designation follow any particular form. The specific provisions of the

[17] (1999), 182 D.L.R. (4th) 249 (Ont. S.C.J.) [hereinafter *Urquhart*].

[18] (2000), 52 O.R. (3d) 61 (C.A.) [hereinafter *Burgess*].

separation agreement met the requirements of the statute where it specifically referred to the benefits under the DPSP. The Court of Appeal ultimately found that the separation agreement showed a clear intention that the wife only receive one-half of the benefits of the DPSP, no more.

The decision in *Burgess* was subsequently adopted in *Purcell v. M.R.S. Trust Co*.[19] This involved an application by the deceased's estate and common law spouse that the estate was entitled to the RRSP proceeds held by the trust company. The deceased's former wife opposed the application on the grounds that she was the originally designated beneficiary of the RRSP. After the couple separated, they obtained a consent judgment which contained a provision specifically stating that the deceased would be the sole owner of the RRSP, free of any claim by the former wife. The estate's position was also supported by the fact that the deceased's will specifically mentioned the former wife, leaving her a single dollar. The court allowed the application, declaring the designation to be revoked by the consent judgment. Agreeing with *Burgess*, the court found that the consent judgment expressly revoked the beneficiary designation of the RRSP, which was never expressed to be irrevocable. Reading the consent judgment as a whole confirmed the intention of the parties to have all claims fully resolved, including any entitlement to the RRSP benefits.

Using Separation Agreements to Revoke Designations

Where former spouses have no expectation that either will continue to be a named beneficiary under each other's benefit plans or pension (or other retirement) plans, ideally, the member or employee spouse should be counselled to revoke any prior beneficiary designations in favour of the former spouse by completing a new beneficiary designation form for the applicable plan, regardless of what the separation agreement contains. However, where this fails to occur, in the event of a dispute, either the estate or the former spouse may attempt to rely on the separation agreement or court order in support of their respective positions.

The legislative framework and applicable case law aptly sets out the relevant principles to be aware of when attempting to use a separation agreement to revoke an existing beneficiary designation. A general release provision will not suffice. In particular, the separation agreement must explicitly refer to the insurance policy in question. The benefit must be described in the provision and the change brought to the attention of the insurance company and noted on the policy to meet the requirements under the *Insurance Act*. In relation to plans not covered by the *Insurance Act*, there must, at a minimum, be a specific reference to the plan in question.

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[19] (2004), 45 C.C.P.B. 105 (Ont. S.C.J.).

However, where these requirements have not been met, the court has shown a willingness to impress the benefit with a constructive trust in favour of the estate, if supporting circumstances exist. For example, where the value of a pension plan was included in the original equalization calculation, an argument may be made that the deceased spouse could not have intended the other spouse to receive the dual benefits.

Finally, just as separation agreements can be used to revoke beneficiary designations, it is important to remember that they can also oblige parties to designate former spouses as beneficiaries of certain benefits. Attempting to revoke that designation in a subsequent instrument will not be valid unless all of the above noted requirements are met. The decision in *Teamsters and Participating Employers of Ontario Pension Plan v. Hay*[20] is one example. The separation agreement designated the former wife as the beneficiary of the deceased's survivor benefits. The deceased's will attempted to revoke that designation by designating his new common law wife as beneficiary. The court found that the will did not contain express mention of the original designation, and therefore the revocation was not valid. Furthermore, the court opined that the change the deceased had attempted could amount to a breach of the separation agreement between the original parties.

A similar conclusion was recently reached in *Schorlemer Estate v. Schorlemer*.[21] In this case, a decision of an arbitrator awarding the entire death benefit from the deceased's insurance policy to his former spouse, in trust for their daughter, was upheld. The former spouses had entered into a separation agreement, in which the husband agreed to designate his former wife as beneficiary, in trust for their daughter. However, the husband subsequently designated his second wife as beneficiary under the insurance policy. The Court upheld the arbitrator's decision noting that the terms of a separation agreement obliging the designation of the other party as beneficiary are binding, despite subsequent decisions by the deceased to designate a different beneficiary. This is so even where the plan administrator or insurance company are not provided a copy of the separation agreement containing the obligation.

The Court summarized the circumstances in which the Court could alter the terms of the separation agreement, as follows:

> In summary, the law as presented in these three cases is that where an insured is obligated under a separation agreement to designate the other party or their children as a beneficiary, that agreement will prevent the designation of another person as beneficiary, whether or

[20] (2003), 65 O.R. (3d) 744 (S.C.J.).

[21] [2006] O.J. No. 5049 (S.C.J.) (QL).

not that agreement is filed with the insurance company. However, the Court has discretion to alter the terms of the separation agreement to ensure adequate support of all dependents where the deceased:

* leaves additional dependents,
* fails to make adequate provisions for those dependents in the terms of his will, and
* has made a beneficiary designation to those subsequent dependents contrary to the terms of the separation agreement.[22]

Conclusion

Neither the use of equitable receivers to access a former spouse's pension benefits nor the use of separation agreements to revoke an existing beneficiary designation are remedies to be relied upon in the first instance. However, in order for either to be valid, the applicable statutory requirements must be met. In the case of the appointment of an equitable receiver, the order cannot be in direct conflict with the PBA. An equitable receiver can, at most, be used to enforce a support order, to a maximum of 50% of the pension benefit. The courts will not allow an equitable receiver to bypass the express remedial restrictions established by the legislature to allow execution of an equalization order that does not otherwise comply with the scheme set out in the PBA. Regarding beneficiary designations, the principles found in the jurisprudence establish the correct process to be followed when seeking to revoke the designation of a former spouse as the beneficiary of certain benefit plans. However, it is not recommended that these be relied on in place of the member or employee spouse taking the appropriate steps outside of the family law proceedings necessary to revoke designations in favour of a former spouse.

[22] *ibid*, at para 48