SUPREME COURT OF NOVA SCOTIA

Citation: Jollimore Estate v. Personal Insurance Company, 2009 NSSC 220

Date: 20090715
Docket: Hfx. No. 307923
Registry: Halifax

Between:

Estate of Theresa Anne Jollimore (Deceased)

Applicant

v.

The Personal Insurance Company of Canada
a body corporate

Respondent

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: May 6, 2009, in Halifax, Nova Scotia

Decision: July 14, 2009

Counsel: Paul B. Miller, for the applicant
James L. Chipman, QC, for the respondent

By the Court:

[1] This is an application brought by the Estate of Theresa Anne Jollimore (deceased). The estate seeks an order for the following relief:

- Confirmation of a settlement entered into by the parties in writing on July 24, 2007.

- Approval of that settlement.

- Granting judgment in the amount of $295,000 plus interest and the costs of this application.

[2] On August 21, 2003 Ms. Jollimore was involved as a passenger in a motor vehicle accident. She suffered a serious brain injury. The applicant commenced a legal action which was settled through mediation. Unfortunately Ms. Jollimore died of a drug overdose on September 18, 2008 before the settlement was implemented. The respondent insurer take the position that they are not bound by this settlement.

[3] The facts are not in dispute:

- Theresa Jollimore was born on January 16, 1987 and was 21 years old at the time of her death.

- Prior to the subject motor vehicle accident Ms. Jollimore suffered from many psychological, behavioural and addiction conditions. She often ran away from home, consumed hard drugs and pretty well lived on the street. She was constantly in conflict with her family, her caregivers and other persons in authority.

- The driver of the motor vehicle was uninsured and subsequent to the accident he disappeared and could not be located.

- Ms. Jollimore suffered a severe brain injury as a result of the accident. This injury added a further level of dysfunction to her pre-accident conditions. It impacted in areas such as “memory, processing speed, emotional regulation, impulsively, and inhibition”.

- On March 1, 2004, Ms. Jollimore's father was appointed litigation guardian. The order referenced Ms. Jollimore as "an infant pursuant to **Civil Procedure Rule** 6.02(1)".

- Mr. Jollimore put his own insurer on notice that his daughter would be claiming compensation under Section "B", Section "D " and the SEF44 provisions of his policy.

- The parties agreed that due to the complexity of Ms. Jollimore's claim they would work cooperatively to resolve damages. Ms. Jollimore was made available for interviews and an independent assessment was completed. Medical, educational and vocational records were voluntarily disclosed.

- Subsequent to these cooperative efforts the parties agreed to proceed by way of mediation.

- The mediation was held on July 24, 2007. Ms. Jollimore's psychiatrist attended and indicated that Ms. Jollimore was incompetent and would require the

assistance of a guardian in the future. Ms. Jollimore was 20 years old at the time of the mediation.

- A settlement was achieved and minutes of settlement signed by both parties. This document stated “full settlement in the sum of $295,000 all in, including costs ... settlement is subject to court approval.”

- Mr. Jollimore instructed his counsel to proceed with an **Incompetent Persons Act** Application and to seek the approval of the settlement. Prior to this being done Ms. Jollimore died as a result of a drug overdose at 21 years of age.

[4] The Applicant’s position is that the litigation guardian and the Respondent entered into a settlement of the deceased’s claim in good faith, with full disclosure, and with full knowledge of the deceased’s age and mental status, and taking into account all risks and contingencies. The Applicant argues that the death of Ms. Jollimore, and the failure to get court approval, does not detract from the negotiated settlement.

[5] The Respondent's position is that Mr. Jollimore did not have proper authority to act as Ms. Jollimore's litigation guardian at the mediation. He submits that Mr. Jollimore's authority as litigation guardian ceased as soon as Ms. Jollimore reached the age of majority. Consequently, these circumstances cause the settlement to fall short of a binding contract because Mr. Jollimore did not have the authority to settle on behalf of Ms. Jollimore. The Respondent readily acknowledges that the settlement was achieved in good faith and that their counsel "did not turn his mind to the fact that Ms. Jollimore was an adult at the time of the mediation."

[6] Fundamental to the Respondent's position is that the 2004 order was based on Ms. Jollimore's status as an infant and not on the basis of mental incompetency. The Respondent concedes that its file contained Ms. Jollimore's date of birth yet it proceeded to mediation on the erroneous assumption that Ms. Jollimore was a minor.

[7] The Respondent insurer advanced several factual points that suggested Ms. Jollimore was opposed to the mediation process and the proposed application pursuant to the **Incompetent Persons Act**. There was also a suggestion that Ms.

Jollimore questioned the authority of her father to act on her behalf. Both of these suggestions have been refuted by Mr. Jollimore.

[8] The January 7, 2008 medical report of Dr. Orlik satisfies me that it is unlikely Ms. Jollimore adopted these positions. In the event that she did utter such protests, I have no confidence that they would be informed choices. In his report Dr. Orlik stated that "it is my professional opinion and conclusion that Theresa Jollimore is not competent to live fully independently or to administer her moneys independently". Dr. Orlik further stated that her cognitive functions were severely compromised.

[9] Dr. Orlik's report offered the following respecting Ms. Jollimore's attitude to the settlement:

> Theresa is aware that she is entitled to moneys as a result of the brain injury. Her plans for this money are extremely unrealistic and immature, for example in that she believes she would be able to live in Florida completely independently, pay for schooling there, for accommodation, get involved in buying and selling cars, etc. Most recently she describes herself as being "high-maintenance" and specified that to mean that she needs lots of money for clothes, jewelry, make-up products, electronic products. When asked, she does not know the cost of groceries per month, does not know how to comparison-shop does not understand how far a given sum of money will go. In addition her mental state has been such for many months that she [is] may give money to those who abuse her or otherwise take advantage of her. Her substance abuse also is not under control

> and she is very likely to spend money on street drugs or illicitly obtained prescription drugs.

[10] The Respondent further argues that in the summer of 2008 Ms. Jollimore scheduled an appointment with lawyer Lance Scaravelli. The Respondent intimates that the purpose of this appointment was to oppose the settlement and the application under the **Incompetent Persons Act**. Ms. Jollimore did not keep this appointment and therefore the reason for the appointment is entirely speculative.

[11] These factual arguments do nothing to resolve this application. This case is all about whether the parties have a binding settlement contract.

[12] There can be no question but that the parties left the mediation understanding they had a binding settlement. The evidence as a whole supports this conclusion. The Respondent's brief at page 3 indicates their acceptance of this evidence:

> "There is no doubt that, had the respondent been negotiating with Mr. Jollimore on his own behalf, all of the elements required for a binding contract between the parties would have been present."

[13] And further:

> "It is important to stress at the outset that the Respondent acknowledges that it entered into good faith negotiations with Mr. Jollimore at the Mediation, and fully intended to reach a settlement as set out in the Minutes of Settlement. It is also important to note that the negotiations between the Respondent and Mr. Jollimore have been conducted, since the outset of the Claim, amicably and in good faith, and that the Respondent alleges no improper intent on Mr. Jollimore's part at any point in said negotiations."

[14] I see the following issues at play in this application:

- Was the Litigation Guardian Order based on mental incompetency, infancy or both?

- Was the Litigation Guardian Order effective at the time of the mediation?

- In the event that the Litigation Guardian Order expired on Mr. Jollimore's 19th birthday, does such affect the settlement achieved on her behalf?

- Did the lack of court approval affect the settlement?

THE LITIGATION GUARDIAN ORDER

[15] This order was issued by this Court on March 15, 2004 when Ms. Jollimore was 17 years old. It is obvious on the face of the order that the drafter inserted in the recital the words "who is an infant." It is also clear on the face of the recital

that the justice altered "pursuant to **Civil Procedure Rule** 6.03(3)" with the words "pursuant to **Civil Procedure Rule** 6.02(1)."

[16] I have no doubt that the evidence before the court supports disability both on the basis of age and mental infirmity. Dr. Orlik's report clearly established that Ms. Jollimore was "not competent". Dr. Wayne MacDonald's report, as well as the present affidavits, fully support this conclusion. It has also been established that Dr. Orlik presented this opinion at the mediation.

[17] The following definitions appear in Rule 1.05(1972) at subsections (R) and (v):

> (R) "Mentally incompetent person" means a person, not an infant, who is incapable from infirmity of the mind of managing his own affairs.
>
> (V) "Person under disability" means a person who is an infant or a mentally incompetent person.

[18] **Civil Procedure Rule** 6.03(3) addresses "mentally incompetent person". It is obvious from the above definition that this term cannot include an infant. **Civil Procedure Rule** 6.02 (1) (1972) addresses a "personal under disability" which

includes an infant. These are two separate rules. I must accept the order as it appears and I am precluded from going behind it. The order was made pursuant to Rule 6.02(1) and consequently it was based on Ms. Jollimore's infancy. The natural consequence of this conclusion is that the formal order expired on January 16, 2006 when Ms. Jollimore attained the age of majority.

EFFECT OF EXPIRY ON SETTLEMENT:

[19] The Respondent takes the position that when the litigation guardian order expired Mr. Jollimore no longer had the authority to settle on his daughter's behalf. The applicant argues that under section 6.03 of the **Guardianship Act** "any person" can act as a litigation guardian with or without court approval. While the applicant refers to the **Guardianship Act**, it appears as if the proper authority for this argument is **Civil Procedure Rule** 6.03 (1972). It is the applicant's position that when the 2004 order expired it was replaced by a de facto Incompetence Order not approved by the court. In other words it applied solely by virtue of the rule.

[20] The Applicant submits **Civil Procedure Rule** 6.03(1) supports the *de facto* order.

> Unless the court otherwise orders or an enactment otherwise provides, any person may be a litigation guardian of a person under disability without being appointed by the court.

[21] This rule refers to a "person under disability" which includes a minor and a mentally incompetent person. I do accept that Ms. Jollimore was a "person under disability" at the time of the mediation and until the time of her death. While this argument is generally applicable, I do not find that it has application where a formal order has been issued by the Court. **Civil Procedure Rule** 6.03(1) states "unless the court otherwise orders, or an enactment otherwise provides."

[22] It is not disputed that both parties participated in the settlement with the understanding that Mr. Jollimore was the litigation guardian for Ms. Jollimore. It was only after the mediation, and Ms. Jollimore's death, that the status of the order, and Mr. Jollimore's authority, were questioned. It is also not disputed that the Respondent's files contained many indicators of Ms. Jollimore's exact age.

[23] It is trite to state that a court has the authority to enforce a settlement agreement as a binding contract. *Robertson v. Walwyn Stodgell Cochrane Murray Ltd*. (1988), 24 B.C.L.R. (2d) 385 (C.A.).

[24] The determination of a valid contract is discussed in Fridman in The Law of Contract (5th ED) 2006 at page 15:

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other *party* was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*:
>
> > the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.
>
> Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what. This is especially true when a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further. Indeed, once that has been done, it may not be possible to have recourse outside such document either to other written material or to parol evidence from the parties or anyone else, in order to explain, or otherwise clarify what is contained in the document. ...

[25] The evidence generally, and the minutes of settlement specifically, establishes that the parties did contract and were *ad idem* on its terms. The

"objective reasonable bystander" could not arrive at any other conclusion. All the elements of a contract are present subject to the argument that Mr. Jollimore did not have the authority to negotiate and agree to the settlement.

[26] I have a great deal of difficulty with the Respondent's position. It is clear that the settlement was arrived at in good faith after the Respondent was provided with all relevant information. The Respondent was fully apprised of the risks associated with Ms. Jollimore's lifestyle and health. The settlement figure reflected these factors. The Respondent's unwillingness to honour the agreement is predicated on taking advantage of Ms. Jollimore's unfortunate demise. It seems as if the Respondents feel that Ms. Jollimore's heirs will experience a windfall. It is just as easy to argue that failing to order enforcement would result in a windfall to the Respondent.

[27] It is important to enforce settlements. Parties must be able to rely on negotiated resolutions. The importance of this principle was referenced in *Wu Estate v. Zurich Insurance Company*, 2006 CarswellOnt 2971 (Ont. C.A.) at paragraph 29:

> Finally, we note that the considerations of fairness and promoting settlements favour enforcement. We see nothing unfair to the respondents in enforcing this settlement. They agreed to pay the sum specified in the minutes of settlement to settle Rebecca Wu's accident benefits claim. When they decided to settle the claim for that amount, they were in possession of all the relevant facts respecting the claim and had ample opportunity to assess all contingencies. There are no grounds such as mistake or misrepresentation for refusing to enforce the settlement.

[28] While this case dealt with court approval, it was very similar to Ms. Jollimore's case. There was nothing inherently questionable about the settlement and in both cases the insurer attempted to set aside the agreement on the basis of an external factor. I see much similarity between a settlement awaiting court approval and the integrity of the Litigation Guardians Order. The purpose of both is to protect the young and weak who are drawn into litigation.

[29] The Ontario Court of Appeal in *Wu Estate*, *supra*, provided the following analysis which is of great assistance in deciding this application:

> The starting point for analyzing the legal status of the settlement agreement is to consider the situation that existed immediately before Rebecca Wu's unexpected death. In *Smallman v. Smallman*, [1971] 3 All E.R. 717 (Eng. C.A.), at 720, Denning M.R. provided the following helpful statement of the legal status of a settlement agreement that is subject to court approval:
>
> > In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an

> agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

> 10. The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit' or 'welfare'": *Eve, Re*, [1986] 2 S.C.R. 388 (S.C.C.) at para.73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (Ont.C.A.), at 268. The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.). The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.

[30] It should not be forgotten that at the time of the settlement Ms. Jollimore was incompetent. This is not a situation where an infant reaches the age of majority and is then fully competent to conduct her own affairs.

[31] I conclude that the settlement is binding on the parties. It was arrived at appropriately. It reflected the injuries sustained by Ms. Jollimore in the subject motor vehicle accident. It reflected normal life expectancy for a person in Ms. Jollimore's circumstances. It is not now appropriate to roll back the agreement

because Ms. Jollimore's life did not roll out the way it was anticipated at the mediation. Premature death can occur to any litigant. It would be unfair if every agreement could be challenged when such contingencies arise.

LACK OF COURT APPROVAL:

[32] The Court of Appeals decision in *Wu Estate, supra*, resolves this question. The cite from Denning, M.R., cited earlier in this decision settles the question. The following quote appears at page 6:

> We conclude from this analysis that immediately prior to Rebecca Wu's death there was in law an agreement, which the respondent could not disavow, to settle her claim on the terms recorded in the minutes of settlement, but that the operation of that agreement was suspended pending court approval.

At page 7 the court further states:

> ... Once Rebecca Wu's contractual right passed to the estate, there was no longer a party under disability. Court approval was no longer necessary to protect the interest of the party seeking to enforce the settlement. As the need for court approval disappeared upon Rebecca Wu's death, the minutes of settlement became operational and her estate could enforce the obligation to pay.

At page 8 the court says:

> With respect to the respondent's second submission, even if we were to accept the respondent's submission that court approval is a "condition precedent" that must be satisfied to make the agreement enforceable by the appellant, we see no reason why court approval cannot be granted despite Rebecca Wu's death.
>
> The court concluded, at page 9 and 10:
>
> Finally, we note that the considerations of fairness and promoting settlements favour enforcement. We see nothing unfair to the respondents in enforcing this settlement. They agreed to pay the sum specified in the minutes of settlement to settle Rebecca Wu's accident benefits claim. When they decided to settle the claim for that amount, they were in possession of all the relevant facts respecting the claim and had ample opportunity to assess all contingencies. There are no grounds such as mistake or misrepresentation for refusing to enforce the settlement.

CONCLUSION:

[33] There will be an order confirming a settlement in favour of the applicant in the amount of $295,000 plus interest. That settlement is approved by the Court.

[34] I will hear the parties on costs of this application should they not agree.

J.