

AXA Insurance Co. of Canada v. Prince

AXA Insurance Co. of Canada v. Prince et al.

159 D.L.R. (4th) 41

Ontario Court of Appeal

Court File No. C26080

Morden A.C.J.O., Osborne and Austin JJ.A.

February 18, 1998;

APRIL 17, 1998

Family law — Domestic contracts — Separation agreement — Interpretation — Effect of agreement — Insurance proceeds — Wife releasing all claims against husband and his estate in separation agreement — Husband subsequently cohabiting with another woman — Husband killed in car accident — Both wife and woman husband living with being "spouses" for purposes of claiming no-fault death benefit — Wife disentitled from share of death benefit because of separation agreement — Insurance Act, R.S.O. 1990, c. I.8 — Statutory Accident Benefits Schedule, O. Reg. 776/93.

Insurance — Automobile insurance — "No fault" benefits — Death benefits — Entitlement — Spouse — Effect of separation agreement — Wife releasing all claims against husband and his estate in separation agreement — Husband subsequently cohabiting with another woman — Husband killed in car accident — Both wife and woman husband living with being "spouses" for purposes of claiming no-fault death benefit — Wife disentitled from share of death benefit because of separation agreement — Insurance Act, R.S.O. 1990, c. I.8 - - Statutory Accident Benefits Schedule, O. Reg. 776/93.

When a man died in an automobile accident he had two "spouses" for no-fault death benefits pursuant to O. Reg. 776/93 (the "Statutory Accident Benefits Schedule") enacted pursuant to the Insurance Act, R.S.O. 1990, c. I.8: his wife, from whom he had been separated for about five years, and the woman with whom he had been living for more than one year. The woman with whom he had been living claimed the entire death benefit and the wife claimed one-half of it, consistent with the Regulation which provided for equal sharing of the death benefit if there was more than one spouse entitled to claim it. At issue was whether a separation agreement which the wife had signed in which she released all of her [page42] claims against the deceased and his estate precluded her from claiming any part of the death benefit. Faced with these competing claims, the insurance company paid the money into court and each of the spouses then moved for payment out of court. The motions judge was unable to construe the separation agreement as

disentitling the wife, and ordered that the money be paid out to the deceased's spouses equally.

On appeal by the woman with whom the deceased had been living, held, Morden A.C.J.O. dissenting, the appeal should be allowed and an order issued declaring that the woman with whom the deceased had been living was entitled to the entire death benefit.

Per Osborne J.A., Austin J.A. concurring: In order to receive one-half of the death benefit, the wife had to establish that she was "entitled" to a share of it under s. 51(7) of O. Reg. 776/93. The wife had released all claims that she might have arising out of her marriage to the deceased. In the circumstances, she was not a person "entitled" to claim as the deceased's spouse. The woman who had been living with the deceased was therefore entitled to the death benefit.

Per Morden A.C.J.O. dissenting: The conclusion of the motions judge was correct. The word "entitled" in s. 51(7) is not intended to provide for a case where there is an agreement in which a spouse contracted out of claims against the other spouse. In any event, the terms of the separation agreement do not disentitle the deceased's wife. The terms of the agreement bound only the deceased and his estate. The insurance proceeds were never the property of the deceased and did not form part of his estate.

Cases referred to

By Osborne J.A.

Baker v. Hall (1985), 10 C.C.L.I. 25, 44 R.F.L. (2d) 275, 36 Alta. L.R. (2d) 345, 59 A.R. 272 sub nom. Hall's Estate v. Hall and Sun Life Canada -- distd

Vail v. Vail Estate (1988), 34 C.C.L.I. 261, 31 E.T.R. 110, [1989] I.L.R. 1- 2410 sub nom. Vail v. Spenceley, 12 A.C.W.S. (3d) 330 -- distd

Vodden v. Vodden (1983), 3 C.C.L.I. 252, [1984] I.L.R. 1-1752 -- distd

Statutes referred to Insurance Act, R.S.O. 1990, c. I.8 s. 271 [am. 1993, c. 10, s. 28] Judges Act, R.S.C. 1985, c. J-1 s. 44(4) [repealed R.S.C. 1985, c. 39 (3rd Supp.), s. 2(1); reenacted 1996, c. 30, s. 3]

Regulations referred to Statutory Accident Benefits Schedule, O. Reg. 776/93 -- now Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996 s. 1, definition "accident" s. 1, definition "spouse" s. 51(1) s. 51(7)
[page43]

APPEAL from a judgment of a motions judge in proceedings pursuant to the Insurance Act (Ont.), ordering that a no-fault death benefit be shared equally by the deceased's two spouses.

P.D. Amey, for appellant, Faye Prince.

G. McSevney, for respondent, Jo-ann Sherbanuk.

MORDEN A.C.J.O. (DISSENTING)

¶ 1 **OSBORNE J.A.** (AUSTIN J.A. CONCURRING):—When Perry Sherbanuk was killed in an automobile accident he had two spouses for no-fault death benefit purposes, one his wife from whom he had been separated for about five years, and the other, the woman with whom he had been living for more than one year. The issue on this appeal is whether a separation agreement in which the deceased's "wife" released all of her claims against the deceased and his estate precludes her from claiming any part of the death benefit.

¶ 2 The motions judge concluded, in a brief endorsement, that the separation agreement did not disentitle the deceased's "wife" from payment of one-half of the death benefit, consistent with the relevant regulation which provides for the equal sharing of the death benefit if there is more than one "spouse" entitled to it. He thus ordered that the deceased's two spouses, the appellant and respondent, share the death benefit equally. The respondent appeals from that decision.

The Facts

¶ 3 The deceased and the respondent were married in 1984. They separated in 1990. On May 11, 1992, they signed a separation agreement. I will refer to some of its terms shortly. In 1991, the deceased and the appellant began to live together. The deceased was killed in an automobile accident on August 30, 1995. At the time of his death he remained married to the respondent and had lived with the appellant continuously for more than one year.

¶ 4 When he died the deceased was insured with AXA Insurance Company of Canada ("AXA"). AXA acknowledged an obligation to pay a no-fault death benefit of \$98,596.24 since the deceased died in an automobile accident. As it turned out, the appellant, the "spouse" with whom the deceased had been living for more than one year at the time of his death, claimed all of the death benefit and the respondent, the deceased's "spouse" by marriage, claimed one-half of the death benefit. Faced with these competing claims, AXA moved under s. 271 of the Insurance Act, R.S.O. 1990, c. I.8, to pay *[page44]* the death benefit into court. The order AXA sought was made on May 16, 1996, and the motion was adjourned sine die. Each of the spouses then moved for payment out of court, the wife for payment of one-half to each and the other spouse for payment of all the money to her. The motions judge was unable to construe the separation agreement as disentitling the wife, and by order dated October 30, 1996, ordered that the money be paid out to the deceased's spouses equally.

Analysis

¶ 5 It is accepted that both the appellant and the respondent come within the definition of "spouse" in s. 1 of Ontario Regulation 776/93 (the "Statutory Accident Benefits Schedule") which defines "spouse" as follows:

"spouse" means either of a man and a woman who,

(a) are married to each other,

.....

(c) have lived together in a conjugal relationship outside marriage at some time during the previous year and have lived together in a conjugal relationship outside marriage,

(i) continuously for a period of at least one year,

¶ 6 Section 51(1) of Regulation 776/93 deals with the payment of the automobile insurance no-fault death benefit. It provides:

51(1) If an insured person dies as a result of an accident, the insured person is survived by a spouse who was his or her spouse at the time of the accident and,

(a) the insured person met any of the qualifications set out in subsection 7(1), the insurer shall pay the spouse an amount equal to the insured person's net weekly income from employment determined in accordance with section 81 or 82 multiplied by 187.2;

¶ 7 The Regulation recognizes that, given the definition of "spouse", there may be situations where a deceased has more than one spouse. Section 51(7) of the Regulation provides that in those circumstances:

51(7) If at the time of the accident the insured person had more than one person entitled to claim as his or her spouse, the payment under subsection (1) shall be divided equally between or among such persons who survived the insured person and who at the time of death were still spouses of the insured person.

¶ 8 The claims of the appellant and respondent to the death benefit raise two related issues: *[page45]* . Is the separation agreement capable of eliminating the respondent's right to be paid one-half of the death benefit under s. 51(7) of the Regulation?

. If the answer to the above question is yes, does the separation agreement dated May 11, 1992, preclude the respondent from receiving one-half of the death benefit?

The effect of a separation agreement on entitlement to the automobile insurance policy no-fault death benefit

¶ 9 The payment of the death benefit to a "spouse" in circumstances where s. 51(1) applies is mandatory in the sense that it requires the automobile insurer to pay the

prescribed death benefit if an "insured person" dies as a result of an accident (as accident is defined in s. 1 of the Regulation) and is survived by a spouse.

¶ 10 Section 51(7) qualifies the right of a spouse to an equal share of the death benefit, in those circumstances where more than one person comes within the definition of spouse, by its reference to a "person entitled to claim" as a spouse of the deceased, insured person. This raises the question -- what is meant by a spouse "entitled" to claim a share of the death benefit?

¶ 11 As I read s. 51(7), it assumes that the claimant fits the definition of "spouse" and requires a further consideration of the spouse's entitlement to the death benefit. Thus, in these circumstances, the existence of the separation agreement is relevant to the issue of the respondent's claim that she is "entitled" to share the death benefit with the appellant. In my opinion, had the legislature intended that this entitlement qualification require that a claimant spouse do no more than establish that she or he falls within the Regulation's definition of "spouse", it would have said so in plain language that related the death benefit entitlement to the definition of "spouse".

¶ 12 If this is not the correct interpretation of s. 51(7), no separation agreement would be capable of affecting the death benefit claim of a separated spouse. As the respondent acknowledges, only a final divorce could extinguish that claim. Thus, a "spouse" who has been separated from a deceased insured person for decades would be entitled to share the death benefit equally with a "spouse" with whom the deceased has been living for decades in circumstances where the separated, but not divorced, spouse has, in a separation agreement, released all claims arising from the marriage. This makes no sense to me. It seems to me that where a husband and [page46] wife have decided to consensually resolve their differences to achieve, among other benefits, stability in their futures, their agreement should be taken into account to determine if the claimant spouse (here the respondent for purposes of this analysis) is entitled to an equal share of the death benefit. This interpretation of s. 51(7) seems to me to be consistent with the language of the section and in harmony with the general policy objectives of the mandatory no-fault death benefit provisions.

¶ 13 The purpose of the death benefit is to provide some economic assistance to persons (spouses and dependants) who are assumed, in the statutory no-fault scheme, to be economically disadvantaged as a result of an insured person's death. To view the entitlement provisions on the narrow basis suggested by the respondent would ignore these policy objectives.

¶ 14 I acknowledge that there will be cases where a "spouse" will receive the death benefit when there is no economic disadvantage and in cases where the only claimant is a "spouse" who has signed a separation agreement. These are exceptions which should not control the interpretation of the section.

Does the separation agreement signed by the respondent affect her entitlement to an equal share of the death benefit?

¶ 15 In the separation agreement that the respondent and the deceased signed on May 11, 1992, they expressed, by recital, the desire ". . . to settle by agreement all rights, claims, demands, and causes of action which each has or may have arising out of their marriage to one another". The clean break philosophy of the separation agreement is reflected in a number of its operative paragraphs:

5. (a) The husband and wife each acknowledge their obligation and ability to support themselves without financial support from the other, either now or in the future.

(b) Notwithstanding any changes, neither party will ever seek to claim maintenance or support from the other for himself or herself.

(c) (viii) the parties mutually release one another from any claim either now has, or may hereafter have, against the other for maintenance or support, for himself or herself, interim or permanent.

6. The husband and wife agree that no material change, no matter how radical, unexpected, catastrophic, profound or otherwise, will give either party the right to make a claim against the other except as otherwise set out in this contract.

. [page47]

9. The husband and the wife each acknowledge that:

(a) all their personal property has been divided between them to their mutual satisfaction.

.

13. (b) The husband and wife each wish to be able to rely upon this agreement as the final and binding one, a once and for all settlement of all their differences and affairs to avoid ever engaging in further litigation with each other, whether about matters or causes of action existing now or at any time in the future . . .

¶ 16 The separation agreement also contained a number of specific releases:

13. (1) Except as provided in this Agreement, the husband and wife agree that:

.

(b) each releases all rights to and interests in property owned by the other which he or she has or may acquire under the laws of any jurisdiction, and in particular the Family Law Act . . .

(2) The husband and wife release each other from all claims or rights either may have had, or afterwards may acquire, in the estate or the property of the other, whether by way

of title to or administration thereof or statutory allowance or other right under the laws of any jurisdiction . . .

(3) (a) The husband and wife intend this agreement to be final as to all claims and hereby release all such claims arising out of their marriage.

¶ 17 The deceased had discharged all of his obligations under the separation agreement and had no future obligations under the agreement. In my opinion, the deceased and the respondent made a deal in May 1992, whereby they clearly agreed to release one another from all claims, including claims arising out of the marriage. It seems to me that the release contained in paragraph 13(3)(a) - - "the husband and wife intend this agreement to be final as to all claims and hereby release all such claims arising out of their marriage", is significant. The respondent's claim to the death benefit is a claim that she makes as the deceased's "wife". It is a claim arising out of her marriage to the deceased. She released the deceased and his estate from all such claims. The fact that the no-fault death benefit is not part of the deceased's estate does not dilute the force of Mr. Amey's submission that the respondent's claim to an equal share of the death benefit is a claim arising out of her marriage to the deceased.

¶ 18 The respondent relies on three cases: *Vodden v. Vodden* (1983), 3 C.C.L.I. 252 (B.C.S.C.); *Baker v. Hall* (1984), 10 C.C.L.I. 25 (Alta. C.A.); *Vail v. Vail Estate* (1984), 34 C.C.L.I. 261 [page48] (Ont. H.C.). These are all life insurance cases where the deceased had not changed the beneficiary designations in life insurance policies following divorce. They are manifestly distinguishable and, indeed, were not pursued in support of the respondent's position during oral argument. In any case, it is to be noted that the no-fault death benefit is not a benefit with respect to which an insured person has any flexibility in the beneficiary designation. The no-fault death benefit beneficiaries are prescribed by statute.

Conclusion

¶ 19 In order to receive one-half of the death benefit, the respondent had to establish that she was entitled to a share of it under s. 51(7). In my view, the respondent released all claims that she might have arising out of her marriage to the deceased. In the circumstances, she is not a person "entitled" to claim as the deceased's spouse. The appellant is, therefore, entitled to the death benefit.

¶ 20 I would allow the appeal with costs, set aside the order below and in its place issue an order declaring that the appellant is entitled to the death benefit under the deceased's automobile insurance policy number 0370942 issued by AXA. I would further direct that the death benefit with accrued interest, be paid out of court to the appellant. The appellant is entitled to costs of the interpleader proceedings.

¶ 21 **MORDEN A.C.J.O.** (DISSENTING):—I have had the benefit of reading Osborne J.A.'s reasons. My intuitive reaction to the facts of this case is that it would not be unfair if the deceased's wife did not share in the death benefit payment. The process of

reasoning from the facts, which I feel obliged to follow, however, leads me to the conclusion that she is entitled to share. My reasons, briefly, are as follows.

¶ 22 By the terms of the relevant provisions in the separation agreement, it is clear that the husband and the wife released all of their claims against the other party and his or her estate. The insurance proceeds, now in court, never were the property of the husband and do not form part of his estate.

¶ 23 I agree with Osborne J.A. that the separation agreement would not be a bar to the wife's claim against the insurance company if she were the sole claimant. She is a "spouse" within the meaning of this word in ss. 1 and 51(1) in O. Reg. 776/93.

¶ 24 My colleague's reasoning why she would not have a claim *[page49]* to one-half of the payment under s. 51(7) is based on the word "entitled" in the opening clause of this provision. With respect, I do not agree that "entitled" is intended to provide for, or recognize, a case where there is an agreement in which a spouse contracted out of claims against the other spouse. In my view, the word is intended merely to be part of the description of a case where more than one person qualifies as a spouse under the definition in s. 1 of the regulation. The substantive part of s. 51(7) which confers the right in question and which is in the next clause in the subsection, seems to bear this out. It provides that the payment shall be "divided equally between or among such persons who survive the insured person and who, at the time of death, were still spouses of the insured person". All that is required is that the persons be "still [be] spouses of the insured person" at the time of death. There is no further requirement.

¶ 25 In any event, the terms of the separation agreement do not disentitle the deceased's wife. The terms of this agreement only bind the deceased's wife and his estate. As I have said, the insurance proceeds, now in court, were never the property of the husband and do not form part of his estate. The separation agreement's terms confer no rights or obligations on the insurance company or on the cohabiting spouse. They are not part of an instrument, like a deed-poll, declaring to all the world the wife's intention. As such, I do not see how they disentitle her to claim.

¶ 26 If the makers of the regulation desire to deprive someone in the position of the wife in the present circumstances of a claim to a death benefit they should express themselves more fully than they have in the current form of the regulation. An example of legislation where this kind of result is provided for may be found in the proposed amendment to s. 44(4) of the Judges Act, R.S.C. 1985, c. J-1, in s. 9 of Bill C-37 (first reading March 19, 1998) which provides that a surviving spouse is not entitled to an annuity under the Act "if the surviving spouse has waived his or her entitlement to the annuity under a separation agreement . . .". The regulation, following this approach, could use broader wording than this to accomplish the same result respecting death benefits.

¶ 27 For these reasons, I think that the conclusion of the motions judge was correct and I would dismiss the appeal.

Appeal allowed. *[page50]*