

CITATION: Agyemang v. The Great-West Life Assurance Company et al, 2024 ONSC 3295
COURT FILE NO.: CV-17-00575519-0000
DATE: 20240607

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Alice Osei Agyemang

AND:

The Great-West Life Assurance Company, The Canada Life Assurance Company, Mondelez Canada Inc. and Mondelez Canada Inc. Scarborough Dad's Bakery

BEFORE: J.T. Akbarali J

COUNSEL: *Alice Osei Agyemang*, in person

Sandra G. Drozd, for the defendant The Canada Life Assurance Company, the Great-West Life Assurance Company

Jordan D. Winch, for the defendants Mondelez Canada Inc. and Mondelez Canada Inc. Scarborough Dad's Bakery

Matthew Ng, for the non-party Office of the Public Guardian and Trustee

HEARD: June 7, 2024

ENDORSEMENT

Overview

[1] The defendant, The Canada Life Assurance Company, The Great-West Life Assurance Company¹ ("Canada Life"), brings this motion asking the court to order that the plaintiff, Ms. Agyemang, attend a capacity assessment.

[2] Because Ms. Agyemang does not speak much English, I am going to try to explain my decision in a way that is easy for her to understand. Canada Life is concerned that Ms. Agyemang may not be able to understand information about this lawsuit and may need help to continue it. It

¹ By Letters Patent of Amalgamation dated November 12, 2019, The Great-West Life Assurance Company, The Canada Life Assurance Company, London Life Insurance Company, Canada Life Financial Corporation and London Insurance Group Inc. amalgamated and continued as one company, under the name The Canada Life Assurance Company, effective January 1, 2020.

thinks she might get help from a “litigation guardian”, which is someone who the court can decide will help Ms. Agyemang to do what has to be done in her lawsuit. But before the court will make someone a litigation guardian, it first has to have evidence that Ms. Agyemang needs one. Canada Life asks that Ms. Agyemang go to a capacity assessment so it can find out if the assessor thinks she needs help in her lawsuit.

Brief Background

[3] In this lawsuit, Ms. Agyemang says that she became too sick to work while she was working for the defendant, Mondelez Canada Inc. At Mondelez, a worker who got too sick to work could get money through short-term disability benefits that Mondelez would pay for. If the worker was sick for a long time, they could get money from long-term disability benefits from Canada Life. Canada Life was the insurance company that provided group insurance to people who worked at Mondelez. Ms. Agyemang says Mondelez owes her money for short-term disability payments. She says Canada Life owes her money for long-term disability benefits.

[4] Ms. Agyemang says she is too sick to work because of physical and mental health problems. In her lawsuit, she says that some of her problems are depression, post-traumatic stress disorder, and anxiety.

[5] I became the case management judge in this litigation in December 2022. That means that I help all of the parties to the lawsuit try to move the lawsuit along so it can be decided. Although Ms. Agyemang used to have a lawyer, at least since I have been involved in her case, she has not had a lawyer.

[6] Right away when I became involved, the defendants told me that they were worried that Ms. Agyemang might need help to manage her lawsuit. They thought she might need a litigation guardian.

[7] Ms. Agyemang agreed that the defendants could have her medical records. They are important for her claim, and also for this motion, so I ordered that the defendants could have them.

[8] The defendants have had the chance to look at Ms. Agyemang’s medical records. Now, Canada Life asks me to order that Ms. Agyemang go to a capacity assessment.

When can a judge order that someone go to a capacity assessment?

[9] There are rules and laws that help me to decide whether Ms. Agyemang should go to a capacity assessment.

[10] First, under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which are the rules that tell us how a lawsuit should move forward, a “party under a disability” requires a litigation guardian in a proceeding: r. 7.01(1). “Disability” is defined in r. 1.03(1) to include a person who is mentally incapable within the meaning of ss. 6 or 45 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 6, in respect of an issue in the proceeding.

[11] Section 6 of the *Substitute Decisions Act* says that a person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[12] Put more simply, this means that Ms. Agyemang should have a litigation guardian to help her with her lawsuit if she is not able to understand information about things that happen in the lawsuit, or if she cannot understand what is likely to happen if she makes, or does not make, a decision in the lawsuit. The capacity assessment would let a professional talk to Ms. Agyemang and decide if they think that she cannot understand the issues in lawsuit or cannot understand what will happen in the lawsuit if she makes a decision. Ultimately, it would be up to me to decide whether to get Ms. Agyemang a litigation guardian.

[13] Our law assumes that people are able to manage their litigation without help. One case that says so is called *626381 Ontario Ltd. v. Kagan, Shastri*, 2013 ONSC 4114, at para. 23. The *Substitute Decisions Act* in s. 2(1) says the same thing.

[14] But we also have a law, in s. 105(2) of the *Courts of Justice Act*, R.S.O. 1990, c. 48, that says that where there is a question about whether someone is physically or mentally able to manage their lawsuit without help, the court can order that the person go to a capacity assessment. Canada Life has to prove that I should order the capacity assessment.

[15] Because Canada Life is asking that I order the capacity assessment, the law requires that I can only order it if the question of Ms. Agyemang's mental capacity is relevant to a material, or important, issue in the lawsuit and there is good reason to believe that Canada Life may be right that Ms. Agyemang cannot manage the lawsuit on her own: s. 105(3) *Courts of Justice Act*; *Kagan, Shastri* at para. 35.

[16] In this case, I think that that Ms. Agyemang's ability to understand the lawsuit and make decisions about it is relevant to important issues in the lawsuit. First, at a past conference, Ms. Agyemang told me that she did not know that she had a lawsuit, and she did not know what it was about. Second, this lawsuit cannot go to the next step until the question of Ms. Agyemang's capacity is sorted out. Ms. Agyemang does not seem to know how to move the lawsuit forward herself. Third, the lawsuit itself raises questions about Ms. Agyemang's mental health.

[17] The medical records show that Ms. Agyemang has had mental health problems for a long time. She has been hospitalized involuntarily in the past. Once, the Public Guardian and Trustee had to help manage her medication because she was not able to do it at that time.

[18] The medical records show diagnoses since 2010 of mood disorder, schizophrenia, psychosis, posttraumatic depressive disorder, chronic pain disorder, and generalized anxiety disorder. Her symptoms have included delusions, hearing voices, marked impairment of functioning, vegetative symptoms, lack of energy, lack of initiative or goals, dissatisfaction with life, ignoring self-care, problems with impulse control, insight, intellectual function and judgment, insomnia, sleep paralysis, bizarre behaviour, and disorganization.

[19] Ms. Agyemang was taking anti-psychotic medication in 2020 but stopped in 2021 without talking to a psychiatrist. In 2021 and 2022, Ms. Agyemang's pharmacists reported that she was not able to manage her medication due to a physical, cognitive, and sensory impairment. However, the evidence also shows that she manages her bank account and her finances.

[20] At the hearing today, Ms. Agyemang said she knows she is not well. She did not agree or object to the capacity assessment.

[21] I am satisfied that there is good reason to believe Ms. Agyemang may not be able to manage her lawsuit on her own.

[22] As a result, I order that she go to a capacity assessment at 1 p.m. on September 19, 2024 with Dr. Alina Kaminska, and on any other days that Dr. Kaminska might need to see her again. The questions Dr. Kaminska will investigate are set out in the order.

[23] Once Dr. Kaminska's report is done, she will give it to the lawyer for Canada Life, who will give it to Ms. Agyemang, counsel for Mondelez, the Office of the Public Guardian and Trustee, and the court. We will then set another day to talk about whether Ms. Agyemang needs a litigation guardian to help her. The court will provide an interpreter in Asante Twi for Ms. Agyemang for that attendance.

[24] Canada Life will pay the costs of the capacity assessment.

[25] I also order further production from Ms. Agyemang's family doctor, as set out in the order. Those medical records will be relevant when we consider whether Ms. Agyemang needs a litigation guardian.

[26] The order shall go in the form I have signed.

J.T. Akbarali J.

Date: June 7, 2024